No. 2626

# IN THE UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE NINTH CIRCUIT

MINERS' & MERCHANTS' BANK, a corporation,

*Plaintiff in Error,*

*vs.*

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,

*Defendant in Error.*

# Transcript of Record

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

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No.....

MINERS' & MERCHANTS' BANK, a corporation,

*Plaintiff in Error,*

*vs.*

UNITED STATES FIDELITY & GUARANTY COMPANY, a corporation,

*Defendant in Error.*

NAMES AND ADDRESSES OF COUNSEL.

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661 Colman Building, Seattle, Washington.

H. J. RAMSEY, Esq., Attorney for Defendant in Error,
661 Colman Building, Seattle, Washington.

## COMPLAINT.

Comes now the plaintiff, Miners & Merchants Bank, and for cause of action against the defendant, United States Fidelity & Guaranty Company, complains and alleges:

I.

That at all times herein mentioned the plaintiff, Miners & Merchants Bank, was and is a corporation duly organized, incorporated and existing under and by virtue of the laws of the State of Washington, and doing a general banking business at Ketchikan, Alaska. And has paid its annual license tax last past due.

II.

That at all times herein mentioned the defendant, United States Fidelity & Guaranty Company, was and is a corporation duly organized, incorpo-

rated and existing under and by virtue of the laws of the State of Maryland, and duly authorized to transact a surety business in the State of Washington and within the District of Alaska, and was and is transacting such surety business within the State of Washington and Territory of Alaska, and was and is engaged in writing surety bonds in said territory and state.

III.

That on or about the first day of May, 1906, the defendant, United States Fidelity & Guaranty Company, through its duly authorized agents and representatives, solicited the plaintiff to write fidelity bonds for and upon its employees in its banking house at Ketchikan, Alaska, and particularly to write a bond upon Mack A. Mitchell, cashier of plaintiff, and did apply to the plaintiff to be allowed to fully indemnify and keep indemnified the plaintiff bank against any and all harm, loss or damage on account of any wrongful acts on the part of its cashier, said Mack A. Mitchell.

IV.

That the said defendant held out to the plaintiff, its officers and agents, as an inducement to be allowed, for a consideration and an annual premium to be paid by the plaintiff to the defendant, to write said fidelity bond, that it would at all times, until such time as said bond should be cancelled or terminated, keep the plaintiff bank wholly and fully insured and indemnified against any and all loss or damage on account of the wrongful acts of said

defendant, Mack A. Mitchell, and represented to the plaintiff and did agree to and with the plaintiff that it would from time to time and from year to year cause said bond to be renewed, continued and extended without any additional cost, expense, trouble or annoyance to the plaintiff or its officers, except the payment of the annual premium, and would keep said bond in force and renewed, continued and extended, and would keep the plaintiff fully insured and indemnified against loss or damage in connection with or on account of the wrongful acts or conduct of said Mack A. Mitchell, its cashier.

V.

That the said defendant, United States Fidelity & Guaranty Company, as a further inducement to this plaintiff to place the insurance of its cashier with defendant, and as a part consideration for the premium to be paid by the plaintiff to the defendant, stated and represented to this plaintiff and agreed to and with the plaintiff that the defendant was in a position to give and would give to the plaintiff at all times while said insurance or any renewal or extension thereof were in force, the very best of service and the very highest grade of insurance to be had in that line of surety and fidelity insurance, and that if there should be any changes, alterations, amendments or improvements in the form of the bonds to be written and executed to banks or bankers indemnifying or insuring such bank or bankers against loss by or through their employees, that the said defendant would at all times furnish

to plaintiff such improved or changed form of bond, and see that such bonds were furnished to the plaintiff and that plaintiff should at all times have the benefit and advantage of the most liberal and advantageous bond written by any surety company, and whether it was so expressed in the bond or not, the plainitff should and would at all times have the benefit and advantage of the most liberal provisions contained in any fidelity bond written, or which could or would be written by any like company, and did promise and guarantee that plaintiff should have at all times the fullest and best insurance written or to be had or secured from any surety company.

VI.

That the plaintiff, relying upon said representation, statements and agreements and at the earnest solicitation and request of defendant, United States Fidelity & Guaranty Company, did on or about the 1st day of May, 1906, pay to the defendant, United States Fidelity & Guaranty Company, the sum of $100, as the annual premium upon a bond to be written for the period of one year from the 1st day of April, 1906, to the 1st day of April, 1907, insuring the plaintiff against any unlawful acts on the part of the said Mack A. Mitchell, who was at that time cashier of the plaintiff bank, and who continued to be cashier of said bank and to act in that capacity until on or about the 31st day of December, 1913; and in pursuance of said premium duly paid to defendant corporation, the defendant corporation

did make, execute and deliver to plaintiff its certain fidelity bond, a copy of which is hereto attached, marked exhibit "A" and made a part of this complaint.

VII.

That by the terms and conditions of said bond and the contract had between plaintiff and defendant, it was expressly contracted, understood and agreed that the United States Fidelity & Guaranty Company, as insurer, for an annual premium of $100, guaranteed to pay to the Miners & Merchants Bank of Ketchikan, Alaska, the employer, any and all pecuniary loss which the said bank should sustain of moneys, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, bank notes, accounts, merchandise or other property, including that for which the bank was responsible, occasioned by any act or acts of fraud, dishonesty, forgery, theft, embezzlement, larceny, wrongful abstraction, misapplication or misappropriation or any criminal acts by said Mack A. Mitchell, or through connivance in any position or at any location in the bank's employ, and during the period named in said bond and continuing in the sum of $25,000, until said insurance should be terminated, and did expressly agree to indemnify the plaintiff against any and all pecuniary loss that might be sustained by the bank by reason of the fraud or dishonesty of the said Mack A. Mitchell in connection with the duties of his office or position amounting to embezzlement

or larceny, and which should have been committed during the continuance of said insurance or any renewal thereof.

VIII.

That prior to the expiration of said bond the same was renewed and continued in force, and extended by the defendant, United States Fidelity & Guaranty Company to be effective on the 1st day of April, 1910, said renewal and extension having been made wholly by the United States Fidelity & Guaranty Company, its representatives and agents, and by reason of the original agreement and understanding under which said insurance was written and through and under which said defendant corporation, by its duly authorized representatives, agreed at all times to keep this plaintiff fully indemnified with the best insurance of that character to be obtained with nothing to be done on behalf of plaintiff except to pay the annual premium, which annual premium was paid by plaintiff to the defendant, and received and accepted by defendant, and a written agreement of extension delivered by the defendant corporation to plaintiff, a copy of which extension agreement is hereby attached, marked Exhibit "B" and made a part of this complaint.

IX.

That the defendant corporation continued to renew said surety and fidelity agreement from year to year and until the 1st day of April, 1914, and that plaintiff did, for each year, pay the defendant

corporation in advance its annual premium, and the defendant corporation did during each year receive and accept said annual premium, which annual premium continued to be the sum of $100, until the first day of April, 1913, when the premium was reduced to the sum of $62.50, and the said defendant surety company did at all times continue to renew its agreement of insurance and indemnity to this plaintiff as against the said Mack A. Mitchell, and any and all loss on account of wrongful acts of said Mack A. Mitchell, and said insurance was at all times kept in full force and effect; that the said renewals and extensions until the 1st day of April, 1913, were made in the same way and in the same manner as the one hereto attached, marked Exhibit "B," and were of like tenor and effect.

X.

That on the 1st day of April, 1913, the defendant, United States Fidelity & Guaranty Company, made, executed and delivered to the plaintiff a certain bond in writing, a copy of which is hereto attached marked Exhibit "C" and made a part of this complaint. That said bond was given by the defendant corporation to the plaintiff bank by, through, under and in pursuance of the original agreement and contract indemnifying and insuring said bank as hereinabve stated and as a part of the same transaction. That said bond was and is in the sum of $25,000, and was made for a period of one year from the 1st day of April, 1913, and is still in full force and effect. That the plaintiff

paid to the defendant and the defendant received and accepted from the plaintiff as consideration for said execution, renewal and extension of said bond the sum of $62.50, and then and thereby said insurance agreement and contract was extended and continued in full force and effect until the 1st day of April, 1914.

XI.

That as a consequence of said contract of insurance and in consideration of the payment of the said annual premiums by plaintiff to defendant, the plaintiff was, and has been and is insured and indemnified by the defendant and indemnified and insured by defendant against any and all loss or damage which the said plaintiff should, on account of said Mack A. Mitchell, sustain of moneys, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, bank notes, accounts, merchandise or other property, including that for which the bank was responsible, occasioned by any act or acts of fraud, dishonesty, forgery, theft, embezzlement, larceny, wrongful abstraction, misapplication or misappropriation or any criminal acts by said Mack A. Mitchell, or through connivance in any position or at any location in the bank's employ, and during the period named in said contract of insurance and continuing in the full sum of $25,000, and until the termination of said insurance, which is still in force and has, since April 1st, 1906, been insured

against all wrongful acts of said Mack A. Mitchell amounting to larceny or embezzlement.

XII.

That on or about the 9th day of December, 1913, the plaintiff, Miners & Merchants Bank, discovered certain facts in relation to said Mack A. Mitchell, and conduct on the part of the said Mack A. Mitchell, its cashier, which led the plaintiff to believe that the said Mack A. Mitchell had been guilty of acts or conduct which would give rise to a claim under said contract of insurance, and did thereupon and immediately prepare and serve upon the local agent and representative of the United States Fidelity & Guaranty Company, at Seattle, Washington, and did mail to the United States Fidelity & Guaranty Company, at its head office at Baltimore, Maryland, a certain notice in writing, a copy of which is hereto attached marked Exhibit "D" and made a part hereof. That the said plaintiff did prepare in writing the said notice, claim and demand, a copy of which is hereto attached marked Exhibit "C," and did, in strict compliance with the terms and conditions of said bond, address said written notice to the United States Fidelity & Guaranty Company at its head office at Baltimore, Maryland, and did serve upon the local agent and representative of the defendant corporation in the City of Seattle, Washington, a like copy of said notice, claim and demand, and did assert then and there and at that time as against said corporation a claim and demand on account of said

insurance in the sum of $25,000, the full penalty of said contract of insurance.

XIII.

That it was stated and set forth in said notice that the plaintiff had dispatched an expert accountant to Ketchikan, Alaska, to examine the books and records of the bank and the accounts of Mack A. Mitchell, and that upon the return of said expert accountant, further notice would be given, and full information and particulars of all kinds furnished by plaintiff to defendant, in strict compliance with all the terms and conditions of said contract of insurance.

XIV.

That plaintiff did send immediately to Ketchikan, Alaska, an expert accountant and thereafter and upon his return the plaintiff did serve upon and deliver to the United States Fidelity & Guaranty Company, in strict compliance with the terms and conditions of said contract of insurance a further notice, claim and demand, a copy of which is hereto attached, marked Exhibit "E" and made a part of this complaint, which said notice was duly served upon said corporation on the 17th day of December, 1913, and receipt thereof duly acknowledged by the said corporation on the said 17th day of December, 1913.

XV.

That said Mack A. Mitchell was and is guilty of having wrongfully, dishonestly and fraudulently taken or abstracted from the plaintiff bank a total

sum of money in excess of $25,000, the full penalty of said contract of insurance and fidelity bond. That said Mack A. Mitchell was and has been guilty of having violated the terms, conditions and provisions of said indemnity insurance and fidelity bonds as herein before fully set forth, and that said wrongful acts and conduct on the part of said Mack A. Mitchell began on or about the 15th day of May, 1913, and continued to and including the 14th day of August, 1913, during all of which period said contract of insurance was in full force and effect, and that during said period the said Mack A. Mitchell, in express violation of the terms, conditions and provisions of said contract of insurance, did wrongfully and unlawfully take, abstract and remove from said bank a sum of money in excess of $25,000, for all of which the defendant corporation was and is liable to this plaintiff and to the full extent of $25,000.

XVI.

That subsequent to the service of the written notices and demands herein referred to and hereto attached, the plaintiff furnished and supplied to the defendant and to its representatives all facts, circumstances and conditions of the misconduct on the part of said Mack A. Mitchell, and did furnish to the defendant corporation all reasonable particulars and proofs of the correctness of said claim and did freely and willingly at all times give, deliver and furnish to said corporation all the particulars of said larceny and embezzlement on the part of

said Mack A. Mitchell, and of all the facts and particulars showing the said Mack A. Mitchell to have been guilty of fraud and dishonesty in connection with the duties of his office and position, which amounted to embezzlement and larceny and which was committed during the continuance of said contract of insurance, and that the plaintiff did submit and furnish to the said defendant all the books and records of plaintiff bank, together with all papers in connection with the said pecuniary loss sustained by plaintiff, or was occasioned by the wrongful act or acts of fraud, dishonesty, embezzlement and wrongful abstraction or misapplication or misappropriation of funds and property of plaintiff, all of which was and is alleged and affirmed by the plaintiff that the said Mack A. Mitchell was and is guilty. That the plaintiff not only brought all its books, records and papers to Seattle, Washington, and submitted the same to the defendant corporation and its representatives, but at its own expense sent an expert accountant to Ketchikan, Alaska, in company with a representative of defendant corporation, for the purpose of further investigating and examining all the books, papers and records of plaintiff bank, and of placing the defendant corporation in the possession of full and complete data, facts and particulars in connection with the transactions of said Mack A. Mitchell, as cashier of plaintiff bank during the period of said term of insurance.

XVII.

That during all the period between the 15th day of May, 1911, and the 15th day of August, 1913, all the best and most responsible surety companies doing business in the State of Washington and the Territory of Alaska did write and were writing surety and fidelity bonds known as the Bankers' Form of Bond, and containing all the guarantees and liberal provisions of plaintiff's Exhibit "C," and during all of said period the best and most responsible surety companies were writing bonds more liberal in their provisions than Exhibit "C" and carrying and containing better and more substantial guarantys as against loss or damage on account of employees. But for the agreement, promises and representations expressly made to plaintiff by the defendant, through its duly authorized agents and representatives, that it was giving plaintiff the best form of bond and the best insurance to be had, this plaintiff could and would at all times have obtained from other good and responsible surety companies insurance fully indemnifying and guaranteeing it against loss against any wrongful act or acts of its employees. But the plaintiff at all times relied solely and wholly upon the promises and representations of the defendant and its duly authorized agents, and at all times depended solely upon the assurance of defendant and its representatives that plaintiff was fully insured against any loss, harm or damage on account of any of said wrongful

acts of the said Mack A. Mitchell and left the matter of the continuation and renewal of said insurance and of giving the plaintiff at all times the best insurance to be had entirely to the defendant and its representatives and agents.

XVIII.

That during all of the period hereinabove named the defendant charged the plaintiff for said contract of insurance on account of the said Mack A. Mitchell, the highest premium charged or collected by any other surety or fidelity company doing business within the State of Washington or the Territory of Alaska, and did during all of the eight consecutive years charge and collect from this plaintiff the full premium charged by any and all of the most substantial and responsible insurance companies doing business within the Territory or State named, and did at all times charge this plaintiff and collect and receive from this plaintiff during said entire period the premium charged for the best, most modern and up-to-date insurance of that character to be had from any surety company, which premium was at all times paid by plaintiff upon and under the agreement and understanding that it was receiving at the hands of defendant at all times the most modern and up-to-date policy and insurance of that kind or character to be procured.

XIX.

That notwithstanding the above and foregoing facts, circumstances and agreements, the defendant,

United States Fidelity & Guaranty Company, now seeks to repudiate and has repudiated its entire liability and obligation and has denied and denies that it ever agreed or promised to write a modern and up-to-date policy and denies that it was giving or attempting to give the highest class or best class of insurance of the character named which was being written by good and responsible surety companies in this field, and denies that it promised or agreed to give or write a modern and up-to-date policy or to furnish the best insurance of the kind in this or any other instance or that it promised any of its patrons or customers to give or write for them up-to-date policies containing the broad and liberal provisions and guarantys of the form of policy known as the Bankers' Form, and denies and repudiates any and all obligation on account of any of the wrongful acts of said Mack A. Mitchell as herein fully set forth.

XX.

That this plaintiff has made due demand upon said Mack A. Mitchell for the return of the money so wrongfully abstracted by him as aforesaid, and that said Mack A. Mitchell has wholly neglected, failed and refused to repay the same or any part thereof, and that there is now justly due and owing from the said Mack A. Mitchell on account of the matters and things hereinabove set forth a sum of money largely in excess of $25,000.

XXI.

That the plaintiff bank has at all times since it entered into the contract of insurance with the defendant fully complied with all the terms, conditions and provisions of said contract of insurance, and has fully kept and performed all the terms, conditions and provisions of said contract of insurance by it to be kept and performed. That it has fully and promptly paid all premiums, and since the discovery of said wrongful acts and conduct on the part of said Mack A. Mitchell, has fully complied with all the terms and conditions of said contract of insurance on its part to be kept and performed.

XXII.

That notwithstanding said Mack A. Mitchel has wholly violated and breached the terms and conditions and provisions of said bond and has been guilty of all the wrongful acts enumerated in said contract of insurance, and notwithstanding the said Mack A. Mitchell has been guilty of wrongful acts amounting to larceny and embezzlement and notwithstanding the said Mack A. Mitchell has been and is guilty of causing pecuniary loss to plaintiff bank of moneys, bonds, debentures, scrip, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, bank notes, accounts, merchandise or other property, including that for which the bank was responsible, occasioned by the act or acts of fraud, dishonesty, forgery, theft, embezzlement, larceny, wrongful abstraction,

misappropriation or criminal acts of said Mack A. Mitchell, or through connivance in any position or at any location in the bank's employ, and during the period named in said contract of insurance and continuing in the full sum of $25,000, and notwithstanding the said Mack A. Mitchell has been and is guilty of wholly breaching and violating said contract of insurance, and has been and now is guilty of said wrongful and unlawful acts against which the defendant corporation expressly insured and indemnified this plaintiff, and notwithstanding the said Mack A. Mitchell has between the 15th day of May, 1911, and the 15th day of August, 1913, wrongfully abstracted and taken from the plaintiff bank a sum of money largely in excess of $25,000.00, to-wit, the sum of $40,337.83, all of which was embezzled, stolen, taken, abstracted and removed from said bank by said Mack A. Mitchell, during the term of said insurance; and notwithstanding the fact that the plaintiff bank has paid to the defendant corporation, United States Fidelity & Guaranty Company, the annual premiums charged by said corporation for said insurance for a period of eight consecutive years, having paid the said corporation eight consecutive annual premiums upon its contract of insurance upon and against the said Mack A. Mitchell, the said defendant corporation has wrongfully repudiated and now repudiates all liability on account of the said contract of insurance and has refused and refuses to pay to plaintiff the penalty of said bond or any part thereof, and wholly

repudiates its said contract and denies all liability and obligation to plaintiff, and refuses to repay to plaintiff its said loss and damage or any part thereof to the loss and damage of plaintiff in the full and just sum of $25,000.

WHEREFORE, the plaintiff, Miners' & Merchants' Bank, prays for judgment against the defendant, United States Fidelity & Guaranty Company in the sum of twenty-five thousand dollars ($25,000), together with interest thereon at the rate of six per cent (6%) per annum from the 6th day of December, 1913, until paid, together with all proper costs of this action.

JOHN W. ROBERTS,
Attorney for Plaintiff.

STATE OF WASHINGTON, }
} ss.
COUNTY OF KING, }

L. H. Woolfolk, being first duly sworn, on oath deposes and says, that he is the Secretary of the Miners' & Merchants' Bank, plaintiff in the above and foregoing entitled cause of action and that he makes this verification as such Secretary; that he has read the foregoing complaint, knows the contents thereof and believes the same to be true.

L. H. WOOLFOLK.

Subscribed and sworn to before me this 4th day of April, 1914.

JOHN W. ROBERTS,
Notary Public in and for the State of Washington, residing at Seattle.

[Cover]

Exhibit "A."

THE

UNITED STATES FIDELITY AND GUARANTY COMPANY.

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FIDELITY BOND

No.....

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In Behalf of

MACK A. MITCHELL

to

MINERS' & MERCHANTS' BANK,

Ketchikan, Ala.

Date, April 1st, 1906.

Expires, April 1st, 1907.

---

CALHOUN, DENNY & EWING,

DISTRICT AGENTS

Seattle, Wash.

---

Form O. S. 1 M—9-7-03.

CAPITAL PAID IN CASH, $1,700,000.

Amount, $25,000.00. Annual Premium, $100.00

Bond No. 450. No. 5764.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

Home Office,

Baltimore, Md.

WHEREAS, MINERS' & MERCHANTS' BANK, KETCHIKAN, ALASKA, hereinafter called "The Employer," is employing or intends to employ MACK A. MITCHELL in the capacity of CASHIER, hereinafter called "The Employe," and has filed with THE UNITED STATES FIDELITY AND GUARANTY COMPANY, hereinafter called "The Company," an application specifying the amount of security required from said Employe, and has applied to the Company for the grant of this bond; and

WHEREAS, the Company in consideration of the sum of one hundred and 00/100 dollars, now paid as a premium from April 1st, 1906, to April 1st, 1907, at 12 o'clock noon, has agreed upon the terms, provisions and conditions herein contained to issue this bond to the Employer; and

WHEREAS, the Employer has heretofore delivered to the Company certain representations and promises relative to the duties and accounts of the Employe, and other matters, it is hereby understood and agreed that those representations and such promises, and any subsequent representation or promise of the Employer, hereafter required by or lodged with the Company, are hereby expressly warranted to be true.

NOW, THEREFORE, THIS BOND, WITNESSETH, That for the consideration of the premises, the Company shall, during the term above mentioned, or any subsequent renewal of such term and subject to the conditions and provisions herein contained, at the expiration of three months next, after proof, satisfactory to the Company, as hereinafter mentioned, make good and reimburse to the said Employer, such pecuniary loss as may be sustained by the Employer by reason of the fraud or dishonesty of the said Employe in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said Employe from the service of the Employer within the period of this Bond, whichever of these events shall first happen; the Company's total liability on account of said Employe under this Bond or any renewal thereof, not to exceed the sum of TWENTY-FIVE THOUSAND ($25,000) DOLLARS.

PROVIDED, That on the discovery of any act capable of giving rise to a claim hereunder, the Employer shall, at the earliest practical moment, give notice thereof to the Company, and any claim made under this Bond shall be in writing addressed to the Company at its head office in the City of Baltimore; and shall within three months after

the discovery thereof, at the Employer's expense, furnish to the Company reasonable particulars and proofs of the correctness of said claim, and such particulars, if required, shall be verified by affidavit.

PROVIDED FURTHER, That the Company shall not be liable, by virtue of this Bond, for any act or thing done or left undone by the Employe in obedience to, or in pursuance of an instruction or authorization received by him from the Employer or any superior officer, or for any mere error of judgment or bona fide mistake, or any injudicious exercise of discretion on the part of the Employe, in and about all or any matters wherein he shall have been vested with discretion either by instruction or by the rules and regulations of the Employer.

PROVIDED FURTHER, That the Company shall not be liable under this Bond for the amount of any balance that may be found due the Employer from the Employe, and which may have accrued prior to the date hereof, it being the true intent and meaning of this Bond that the Company shall be responsible as aforesaid for moneys, securities, or property diverted from the Employer within the period specified in this Bond.

AND PROVIDED, ALSO, That this Bond is granted upon the express understanding or agreement that as against every corporation or person now being or hereafter becoming security or surety and upon every security held by the Employer for the Employe in his employment as aforesaid, the Company shall have and possess the right of ratable

contribution and all other rights and remedies, both legal and equitable, of co-sureties.

AND ALSO, That, should the Employe become guilty of an offence covered by this Bond, the Employer will immediately, on being requested by the surety to do so, lay information before a proper officer covering the facts and verify the same as required by law and furnish the Company every aid and assistance, not pecuniary, capable of being rendered by the Employer, his or its agents and servants, which will aid in bringing the Employe promptly to justice, and such action when required of the Employer shall be a condition precedent to recover under this Bond.

PROVIDED, That the Company shall have the right, upon giving thirty days' notice in writing to the Employer, to cancel this Bond at the expiration of said thirty days; and if the bond shall be so cancelled, the Company shall refund the proportion of the premium for the unexpired term of risk.

PROVIDED, That the Employe may perform other duties than those properly belonging to the position mentioned in this Bond without notice of such change being given to the Company.

PROVIDED, That the premium due the Company for becoming surety for the Employe named in this Bond shall be paid within thirty days after the delivery hereof, and if not so paid, this Bond shall be void from the beginning, and the Company shall not be liable for any loss hereunder.

AND PROVIDED, LASTLY, That this Bond is also subject to the following conditions:

THAT, any misstatement or suppression of fact in any claim made hereunder renders this Bond void from the beginning.

THIS BOND will become void as to any claim for which the Company would otherwise be liable, if the employer shall fail to notify the Company of the occurrence of the act or commission out of which said claim shall arise immediately after it shall come to the knowledge of the Employer; and the knowledge of a President, Vice-President, Director, Secretary, Treasurer, Manager, Cashier or other like executive officer shall be deemed under this contract the knowledge of the Employer. And upon the making of any claim hereunder, this Bond shall wholly cease and determine as regards any act or omission of the Employe, committed subsequent to the making of such claim, and it shall be surrendered to the Company on the payment of such claim.

THAT, after the expiration of the Company's liability hereunder, and no claim having been presented the then unexpired portion, if any, of the term for which this bond was granted, shall apply to any new Employe whose risk, to the same amount, the said Company may at that time assume or the Company shall at the election of the Employer return to the Employer the unearned premium on return of this Bond for cancellation.

IT IS FURTHER MADE AN EXPRESS CONDITION of this Bond that no suit or action of any kind against the Company for the recovery of any claim upon, under or by virtue of this Bond, shall be sustainable in any court of law or equity, unless such suit or action shall be commenced, and the process served on the Company within the term of twelve months next after the date of filing notice of a claim therefor as hereinbefore provided; in case any suit or action shall be commenced against the Company after the expiration of said period of twelve months the lapse of time shall be taken and deemed as conclusive evidence against the validity of the claim thereby so attempted to be enforced.

THAT no one of the above conditions, or of the provisions contained in this Bond, shall be deemed to have been waived by or on behalf of the Company, unless the waiver be clearly expressed in writing over the signature of its President and Secretary, and its seal thereto affixed.

THAT the Company, upon the execution of this Bond, shall not thereafter be responsible to the Employer, under any bond previously issued to the Employer on behalf of said Employe, and upon the issuance of any Bond subsequent hereto upon said Employe in favor of said Employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) Bond shall be in force at one time, unless otherwise stipulated between the Employer and the Company.

AND THE EMPLOYE doth hereby for himself, his heirs, executors, and administrators, covenant and agree to and with the Company that he will save, defend and keep harmless the Company from and against all loss and damage of whatever nature or kind, and from all legal and other costs and expense, direct or incidental, which the Company shall or may at any time sustain or be put to (whether before or after any legal proceedings by or against it to recover under this Bond, and without notice to him thereof) or for, or by reason or in consequence of, the Company having entered into the present Bond.

IN WITNESS WHEREOF, the said MACK A. MITCHELL (the Employe) has hereunto set his hand and seal, and the Company has caused this Bond to be sealed with its corporate seal, duly attested by the signatures of its Attorneys in Fact, this 1st day of May, one thousand nine hundred and six.

Signed, sealed and delivered by the Employe at.....

.....L. S.

In the presence of

.....

.....

THE UNITED STATES FIDELITY AND GUARANTY COMPANY,

A. KENNARD, Attorney-in-Fact.

DOUGLAS R. TATE, Attorney-in-Fact.

Exhibit "B."

Continuation Certificate No. T-450.

Amount, $25,000.00. Premium, $100.00.

Fidelity Department.

THE UNITED STATES FIDELITY AND GUARANTY COMPANY.

Home Office,
Baltimore, Maryland.

IN CONSIDERATION OF THE SUM OF ONE HUNDRED ($100.00) DOLLARS, THE UNITED STATES FIDELITY AND GUARANTY COMPANY hereby continues in force Bond T-450 in the sum of Twenty-five Thousand ($25,000) Dollars, on behalf of MACK A. MITCHELL in favor of MINERS AND MERCHANTS BANK of Ketchikan, Alaska, for the period beginning the 1st day of April, 1910, and ending on the 1st day of April, 1912, subject to all the covenants and conditions of said original bond heretofore issued, dating from the 1st day of April, 1906.

WITNESS the signature of its Attorney-in-Fact under corporate seal this 1st day of April, 1910.

DOUGLAS R. TATE,
Attorney-in-Fact.

Exhibit "C."

UNITED STATES FIDELITY & GUARANTY COMPANY.

Capital Paid in Cash, $2,000.000.

Total Resources Over $7,400,000.

Home Office:
Baltimore, Md.

No. 27999. $25,000.00.

The UNITED STATES FIDELITY AND GUARANTY COMPANY, as Insurer, for a premium of SIXTY-TWO and 50/100 ($62.50) DOLLARS, hereby guarantees to pay to the MINERS & MERCHANTS BANK of KETCHIKAN, ALASKA, the Employer, such pecuniary loss as the Employer shall sustain (limited only by the provisos hereof) of money, bonds, debentures, scrips, certificates, warrants, transfers, coupons, bills of exchange, promissory notes, checks, bank notes, currency, merchandise or other property, including that for which Employer is responsible, occasioned by any act or acts of fraud, dishonesty, forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication or misappropriation or any criminal act by MACK A. MITCHELL, directly or through connivance in any position and at any location in the Employer's employ, and during the period commencing upon the date hereof and continuing in the sum of TWENTY-FIVE THOU-

SAND ($25,000.00) DOLLARS until the termination of this insurance.

PROVISOS:

1. In the event of the recovery of any loss, or portion thereof, from other than insurance, the Employer shall be entitled thereto until fully reimbursed, the excess, if any, to be paid to the Insurer.

2. The Employer shall deliver notice of any default hereof to the Insurer at its Home Office within ten (10) days after the discovery of such default. All claims shall be submitted, showing the items and dates of the losses, and delivered in writing to the Insurer at its Home Office within three (3) months after their discovery. The Insurer shall have two (2) months after claim has been presented in which to verify and pay the same, during which time no legal proceeding shall be brought against the Insurer as to that claim, nor at all as to that claim after the expiration of twelve (12) months from its date.

3. This insurance shall only terminate by:

(1) The Employer giving notice in writing to the Insurer specifying the date of termination.

(2) The Insurer giving thirty (30) days' notice in writing to the Employer. (The Insurer to refund unearned premium in the above cases.)

(3) The nonpayment of premium for a period of three (3) months beyond date due; all premiums being due in advance.

4. The discovery of any loss through the Employee.

IN TESTIMONY WHEREOF, THE UNITED STATES FIDELITY AND GUARANTY COMPANY has hereunto set its seal. Witness the hand of its Attorney-in-Fact, on this 1st day of April, 1913.

UNITED STATES FIDELITY AND GUARANTY COMPANY,

By C. H. CAMPBELL,

(Seal.) Attorney-in-Fact.

Exhibit "D."

The United States Fidelity and Guaranty Company, a corporation, Baltimore, Maryland, and Seattle, Washington.

On the first day of May, 1906, your company, as insurer, executed to the MINERS & MERCHANTS BANK, Ketchikan, Alaska, as employer, a fidelity bond upon Mack A. Mitchell in the capacity of Cashier of said Miners & Mercahants Bank, conducting a general banking business at Ketchikan, Alaska.

Your bond was in the amount of Twenty-five Thousand Dollars ($25,000), and has been renewed each succeeding year, including the the year 1913, the bond for the year 1913 bearing date April 1st, 1913, your bond having been continuously in force in the same amount since the said 1st day of May, 1906.

The Miners & Merchants Bank hereby notifies

you, under and by virtue of the terms of said various bonds and renewals thereof, that Mr. J. E. Chilberg, of Seattle, Washington, as President of the Miners & Merchants Bank of Ketchikan, Alaska, left Seattle on Sunday, November 30th, for Ketchikan, and has just returned to Seattle and that the Miners & Merchants Bank, through its officers, have just made discoveries which lead the bank and its officers to believe that the said Mack A. Mitchell, as Cashier of said bank, has been guilty of acts giving rise to a claim under your bond and that the Miners & Merchants Bank does hereby make claim upon and against your company for any and all and such loss as it may sustain by reason of, or on account of the acts and conduct of the said Mack A. Mitchell, as set forth in the bonds, to the full *extent* of the indemnity, to-wit, $25,000.

Immediately upon suspecting any wrong-doing on the part of Mitchell the bank placed an expert accountant upon the books. This accountant is still at work and it is expected that he will return to Seattle on or about the 16th day of December, 1913, and when he does return a more full and definite report will be made to your company. It is impossible for the bank at this time to make to you a definite statement of claim as to details and amounts, but it takes this earliest opportunity to place before you such information as it has. It is the belief of the bank at this time that the abstractions from the bank by the cashier and the probable

loss to the bank on account thereof will exceed the sum of $40,000.

The money in question has been taken from the bank through the medium of a concern known as the Revilla Fish Company, in which Mitchell appears to be a stockholder. As nearly as the bank has been able to ascertain the fish corporation is insolvent, and that said corporation has not now and never has had any assets of any particular value.

The exact date that Mitchell began to take moneys from the bank cannot at this time be given, but subject to correction we state that it was about ....., 1911. The entire transaction has been at all times concealed from the bank and its officers by Mitchell and in his reports made to the officers of the Bank at Seattle, from time to time, he concealed the transaction and harmonized the reports by understating the actual amount of deposits, his reports to the officers each time showing the deposits to be less in an amount actually equivalent to the shortage.

Upon the return of the expert accountant everything which he obtains will be at your command and the bank will furnish to your company everything which his report discloses. Mitchell has been removed from his position and is still at Ketchikan, Alaska.

Dated December 9th, 1913.

MINERS & MERCHANTS BANK,
By J. E. Chilberg.

Attest:—L. H. Woolfolk, Secretary.

Address: 1113 Alaska Bldg., Seattle, Wash.

Exhibit "E."

The United States Fidelity and Guaranty Company, Baltimore, Maryland, and Seattle, Washington.

Gentlemen:—

December 9th, 1913, the undersigned, MINERS AND MERCHANTS BANK, doing business at Ketchikan, Alaska, served upon you a statement and a claim against your company on account of Mack A. Mitchell, Cashier of the undersigned bank.

The undersigned Miners and Merchants Bank does, in accordance with the statement made in the claim of December 9th, 1913, hereby supplement said claim and makes the following further statement:

The abstraction of money from the bank by Mack A. Mitchell began on the 15th day of May, 1911, and continued to and including the 14th day of August, 1913, and during that period the said Mitchell has wrongfully, dishonestly and fraudulently taken from the bank a total sum of Forty Thousand Three Hundred Thirty-seven and 83/100 ($40,337.83) Dollars. That said sum of Forty Thousand Three Hundred Thirty-seven and 83/100 ($40,337.83) Dollars was fraudulently taken from the bank by the said Mitchell as follows:

| | |
|---|---|
| From May 15, 1911 to May 1st, 1912 | $20,722.06 |
| From May 1st, 1912, to May 1st, 1913 | 18,927.50 |
| From May 1st, 1913, to August 14, 1913 | 688.27 |
| Total | $40,337.83 |

That said Mack A. Mitchell covered up the transactions from time to time by pretending to give this money to a corporation which was known first as Revilla Reduction Works, the name of which was afterwards changed to the Revilla Fish Products Company. Mitchell was a stockholder and officer in this corporation. The corporation had no assets of any kind except as Mitchell gave it money from the bank, and it now has property, which the undersigned bank has had appraised and as nearly as it can arrive at the value, believes it does not exceed Three Thousand Five Hundred ($3,500) Dollars.

Mitchell took no notes from the corporation and no evidence of any kind of the indebtedness. He now claims it was "overdrafts" and the entire transaction was at all times concealed from the officers of the bank.

On June 30th, 1911, Mitchell prepared a report to the Clerk of the United States District Court at Juneau, Alaska, and another copy to the Honorable William L. Distin, Secretary of Alaska, both of which reports are required by law to be made, and he caused said reports to be filed at that time under oath, and said reports did not show any overdrafts, although Mitchell at that time had taken from the bank and given over to the fish company Thirteen Hundred Eighty-eight and 05/100 ($1,388.05) Dollars of the bank's money. In order to balance his account in the report he deducted $1,388.05 from the

deposits and made a false representation and caused a false affidavit to be filed as to the actual amount of the deposits in the bank. Mitchell at the same time made like statements and reports to the officers of the bank and practiced the same deceit upon the officers of the bank.

On December 30th, 1911, in conformity with the rules and regulations of his Board of Directors and superior officers, he caused to be prepared a statement of the condition of the Miners and Merchants Bank and which statement was by him submitted to the Board at Seattle and said statement, account and report was made and submitted and showed no overdraft and no evidence of the money taken from the bank by Mitchell, and which he now claims he turned over to the fish company, although at that time and on that date he had taken the sum of Four Thousand Three Hundred Seventy-four and 90/100 ($4,374.90) Dollars, but in his report he made no account of such sum or any part thereof, but absolutely concealed it from the officers of the bank by reducing the amount of money actually on deposit in the bank.

On June 30th, 1912, Mitchell made another report to the Clerk of the United States District Court at Juneau and caused the same, duly verified, to be filed as required by law, and at that time he had wrongfully and fraudulently abstracted and taken funds of the bank to the amount of Twenty-three Thousand Six Hundred Nineteen and 60/100 ($23,-

619.61) Dollars and wholly failed to make any report of such sum or to make any accounting whatever of any such sum in the sworn reports filed as required by law, but dishonestly and fraudulently concealed the same both from the officers with whom the reports are required to be filed and with the United States Government, and from the bank and its officers.

On December 31st, 1912, he made another report to his Board of Directors in Seattle and in addition to his written report was personally present before the Board at Seattle and he concealed the fact that he had in any manner taken money or any money from the bank; he disclosed nothing in the way of overdrafts and specifically and expressly stated and represented to the Board that there was no overdraft in the bank, although at that time he had taken from the bank the sum of Thirty-six Thousand Thirty-one and 19/100 ($36,031.19) Dollars.

July 15th, 1913, Mitchell again prepared his annual report to the Secretary of the Territory of Alaska and to the Clerk of the United States District Court at Juneau and caused said report, duly verified and sworn to, to be filed in the manner provided by law and in such reports made no statement of any overdraft or overdrafts and no accounting of any kind of shortage, although he had at that time taken from the bank the sum of Forty Thousand Twenty-eight and 03/100 ($40,028.03) Dol-

lars. That he likewise made his usual annual report and statement to the Board of Directors of the bank, and again absolutely deceived the directors and misrepresented the facts and concealed from them the fact that the said sum of Forty Thousand Twenty-eight and 03/100 ($40,028.03) Dollars or any other sum, had been by him in any manner taken from the bank and again represented that there were no overdrafts of any kind and showed none and both in said sworn reports and in his reports to the directors he had fraudulently and dishonestly and falsely misrepresented the amount of deposits in said bank and had deducted from the deposits the sum of Forty Thousand Twenty-eight and 03/100 ($40,028.03) Dollars, in order to cover up and conceal his wrongful taking of the funds.

Since May 1st, 1913, Mitchell took from the bank the following sums at the following times, and in amounts and items as follows, to-wit:

| | |
|---|---|
| May 29th, 1913 | $394.40 |
| July 7th, 1913 | 3.42 |
| July 8th, 1913 | 73.25 |
| July 18th, 1913 | 6.00 |
| August 12th, 1913 | 203.80 |
| August 14th, 1913 | 100.00 |
| Total | $780.87 |

In the claim made and served upon you on the 9th day of December in this matter for the sum of Twenty-five Thousand ($25,000) Dollars, as pro-

vided in your several bonds and the renewals thereof, it was stated that the bank had an expert accountant working upon the books of the bank, and the undersigned now advises you that that accountant was Mr. O. S. Larson, whose office is at 1113 Alaska Building, Seattle, Washington, you are at liberty to take this matter up with Mr. Larson, who will, on behalf of the bank, furnish you proofs of the correctness of said claim and give to you all the information obtained by him from the books of the bank and all of the items of the account, if you should desire such items, and all of the knowledge and information in his possession, and after having given to you all of such particulars the bank will, if required by you, have the correctness of the claim and acount verified by affidavit. Since Mr. Larson has the records and all data assembled in his office he would prefer, if it is convenient to you, to have you come to his office, but if you shall indicate that you prefer to have Mr. Larson go to your office he will do so at any time you will name as being convenient to you and furnish to you any additional proof and information.

MINERS & MERCHANTS BANK,
By J. E. CHILBERG, President.

Attest:—L. H. Woolfolk, Secretary.

The undersigned, United States Fidelity & Guaranty Company, acknowledges receipt of copy

of the above and foregoing statement this 17th day of December, 1913.

UNITED STATES FIDELITY & GUARANTY COMPANY,
By JOHN C. McCOLLISTER,
Manager and Attorney-in-Fact.

Filed in Clerk's office April 4, 1914. W. K. Sickels, clerk. By F. W. Smith, deputy.

Filed in the U. S. District Court, Western District of Washington, May 14, 1914. Frank L. Crosby, clerk. By E. M. L., deputy.

## ANSWER.

Comes now the United States Fidelity & Guaranty Company, a corporation, and answers the complaint of the plaintiff, as follows:

I.

In answer to Paragraph 1 of said complaint defendant admits the same.

II.

For answer to Paragraph 2 of the complaint defendant admits the same.

III.

For answer to Paragraph 3 of the said complaint this defendant denies the same and each and every allegation therein contained, except that it admits that it did on or about the first day of May, 1906, engage to indemnify and keep indemnified the said plaintiff against alleged loss or damage on ac-

count of the wrongful acts of its cashier, Mack A. Mitchell, in accordance with the conditions, covenants and stipulations to be contained in a written bond of indemnity and not otherwise.

IV.

For answer to Paragraph 4 of the complaint this defendant denies the same and each and every allegation therein contained, except that the said defendant admits that it agreed to indemnify the said plaintiff in accordance with the terms, conditions, covenants and stipulations of such bond of indemnity as it would issue, and not otherwise.

V.

For answer to Paragraph 5 of the said complaint this defendant denies the same and each and every allegation therein contained.

VI.

For answer to Paragraph 6 of the said complaint this defendant admits that on or about the first day of May, 1906, the said plaintiff did pay to the defendant the sum of one hundred ($100.00) dollars as premium upon a bond written for the period of one year from the first day of April, 1906, to the first day of April, 1907; and admits that the said defendant did at the said time, make, execute and deliver to the said plaintiff its certain fidelity bond, the terms of which are as set forth in Exhibit "A," attached to the complaint; and denies each

and every other allegation in the said paragraph contained.

VII.

For answer to Paragraph 7 of the said complaint, this defendant admits that by the terms and conditions of the said bond, the said defendant guaranteed to make good and reimburse to the said plaintiff such pecuniary loss as might be sustained by the said plaintiff by reason of fraud or dishonesty of the said Mack A. Mitchell, in connection with the duties of his office or position, amounting to embezzlement or larceny, and which should have been committed during the continuance of the term of said bond, to-wit, within one year from the first day of April, 1906, or any renewal thereof, and discovered during said continuance or within six months thereafter, but denies each and every other allegation in said paragraph contained.

VIII.

For answer to Paragraph 8 of the said complaint, this defendant admits that from year to year until the first day of April, 1913, said bond was renewed according to the terms expressed in a contract of renewal issued each year as is set forth in Exhibit B attached to the plaintiff's complaint, and denies each and every other allegation in said paragraph contained.

IX.

For answer to Paragraph 9 of said complaint, this defendant admits that the said renewals and extensions until the first day of April, 1913, were made in the same way and in the same manner as the one attached to the complaint, marked Exhibit B, and were of like tenor and effect, and denies each and every other allegation in said paragraph contained.

X.

For answer to Paragraph 10 of the said complaint, defendant admits that on or about the 25th day of November, 1913, a bond, in terms and figures as is set forth in Exhibit C, attached to the complaint, was delivered to this plaintiff, but denies each and every other allegation in said paragraph contained.

XI.

For answer to Paragraph 11 of said complaint, this defendant denies the same and every allegation therein contained.

XII.

For answer to Paragraph 12 of said complaint, this defendant admits that on or about the 9th day of December, 1913, the said plaintiff did serve upon the local agent and representative of the defendant corporation and did mail to the defendant at its head office at Baltimore, Maryland, a certain notice in writing, a copy of which is attached to the com-

plaint, marked Exhibit B, but denies each and every other allegation in said paragraph contained.

XIII.

For answer to Paragraph 13 of said complaint, this defendant admits that the matters and things in said paragraph set forth were stated and set forth in said Notice marked Exhibit B.

XIV.

For answer to Paragraph 14 of said complaint, this defendant admits that on or about the 7th day of December, 1913, the said plaintiff did serve upon the said defendant, a notice, claim and demand, as is set forth in Exhibit E attached to the complaint, but denies each and every other allegation in said paragraph contained.

XV.

For answer to Paragraph 15 of said complaint, this defendant denies the same and every allegation therein contained, and especially denies that the said Mack A. Mitchell was guilty of having wrongfully, dishonestly or fraudulently or at all, taken or abstracted from the plaintiff bank any sum of money in excess of Twenty-five thousand ($25,000) dollars, or any other sum, or at all, and denies that as set forth in said complaint, or at all, the said Mack A. Mitchell did wrongfully or unlawfully take, abstract or remove from the said plaintiff bank a sum of money in excess of Twenty-five thousand

($25,000) dollars or any other sum; and denies that said defendant corporation was or is liable to the said plaintiff to the extent of Twenty-five thousand ($25,000) dollars, or for any other sum, or at all.

XVI.

For answer to Paragraph 16 of said complaint, this defendant denies that it has any knowledge or information sufficient to form a belief as to the truth of any of the matters or things set forth in said paragraph.

XVII.

For answer to Paragraph 17 of said complaint, this defendant denies the same and every allegation therein contained.

XVIII.

For answer to Paragraph 18 of said complaint, this defendant denies the same and every allegation therein contained.

XIX.

For answer to Paragraph 19 of said complaint, this defendant denies the same and every allegation therein contained, and specifically denies that the said defendant now or at any time seeks to repudiate or has at any time repudiated its entire or any liability or obligation upon any bond of indemnity made between plaintiff and defendant.

XX.

For answer to Paragraph 20 of said complaint, this defendant denies that there is now due or

owing from said Mack A. Mitchell on account of the matters or things set forth in said complaint, any sum in excess of Twenty-five thousand ($25,000) dollars, or any sum, and denies it has any knowledge or information sufficient to form a belief as to any of the other matters or things set forth in said paragraph.

XXI.

For answer to Paragraph 21 of said complaint, this defendant denies the same and every allegation therein contained.

XXII.

For answer to Paragraph 22 of said complaint, this defendant admits that it denies all liability and obligation to plaintiff and refuses to repay to plaintiff the sum of Twenty-five thousand ($25,000) dollars or any other sum, and denies each and every other allegation in said paragraph contained.

And for another and first affirmative defense, this defendant avers:

I.

That on or about the first day of April, 1906, the said defendant did make, execute and deliver to the said plaintiff its certain bond of indemnity, in words and figures as set forth in Exhibit A attached to the complaint herein. From year to year thereafter, upon the first day of April, and thereafter, including the first day of April, 1912, said bond was renewed by the issuance to the said plaintiff of a

renewal certificate each year, in words and figures as is set forth in Exhibit B, attached to the complaint of the plaintiff, and not otherwise.

II.

On the first day of April, 1913, said bond of indemnity, renewed as heretofore set forth, together with all liability thereunder, finally expired and terminated.

III.

That no notice or claim of the discovery of any alleged loss, if loss there was, or act capable of giving rise to any claim under said bond, committed during the continuance of the terms of said bond, or any renewal thereof, discovered during the continuance or any renewal thereof, or within six months thereafter, was made at the earliest practical moment after the discovery of such alleged loss or act, if such loss or act there was, as provided in said bond.

IV.

That the plaintiff herein did not, within six months after the first day of April, 1913, or at any time prior to the 9th day of December, 1913, give notice to the defendant of the discovery of any act capable of giving rise to a claim under the said bond dated April 1, 1906, and the renewals thereof, and did not at any time within six months after April 1, 1913, or at any time prior to the 9th day of December, 1913, make any claim in writing or other-

wise against the defendant because of any of the alleged fraudulent or dishonest acts of the said Mack A. Mitchell, contrary to the conditions and provisions of said contract.

And for another and second affirmative defense, this defendant avers:

I.

That after the termination of said bond and the various renewals thereof as aforesaid, on April 1, 1913, and on or about the 25th day of November, 1913, the said plaintiff made application to the said defendant for the issuance to it, the said plaintiff, of a bond indemnifying the said plaintiff against such alleged pecuniary loss as it, the said plaintiff, should sustain on account of alleged loss accruing by the act or acts of the said Mack A. Mitchell.

II.

That at said time the said plaintiff well knew of all the acts of the said Mack A. Mitchell as set forth in the complaint herein, and well knew all the matters and things pertaining to said alleged loss claimed to have been occasioned by the acts of the said Mack A. Mitchell to the plaintiff; and that at said time the said defendant had no knowledge or means of knowledge of any of the said alleged acts of the said Mack A. Mitchell or of any of the matters or things pertaining to the said alleged loss on account of the said alleged acts of the said Mack A. Mitchell; that thereupon the plaintiff did repre-

sent to this defendant that there had been no acts of fraud, theft, larceny, embezzlement, wrongful abstraction or misappropriation or any criminal act by the said Mack A. Mitchell or any act so as to occasion any alleged loss to the plaintiff, and did conceal from the defendant all of the alleged wrongful acts of the said Mack A. Mitchell, and that the plaintiff did represent to this defendant that the accounts of the said Mack A. Mitchell were in all particulars correct; that thereupon the defendant, relying upon said representations and in ignorance of all of said alleged acts of the said Mack A. Mitchell, and not otherwise, did execute and deliver to the plaintiff the said bond, a copy of which is attached to the complaint herein, marked Exhibit C, and did accept said premium of Sixty-two and 50/100 ($62.50) dollars, and did not thereafter discover that the said plaintiff did claim that the said Mack A. Mitchell had been guilty of any alleged fraudulent or wrongful acts until on or about the 10th day of December, 1913, and that immediately upon the discovery by the defendant of the plaintiff's claim herein, and that the plaintiff, on the said 25th day of November, 1913, had concealed from the defendant the alleged wrongful and fraudulent acts of the said Mack A. Mitchell on said 10th day of November, 1913, the said defendant did tender to the plaintiff the repayment of said Sixty-two and 50/100 ($62.50) dollars, which said tender was refused by the plaintiff, and the defendant ever

since has been and is now ready and willing to repay and return to the plaintiff, and does hereby offer to return and repay to the plaintiff, the said sum of Sixty-two and 50/100 ($62.50) dollars paid to the defendant by the plaintiff as premium upon said bond. That by reason of the premises the said bond, a copy of which is attached to plaintiff's complaint herein as Exhibit C, became and was and is null and void.

And for another and third affirmative defense, this defendant avers:

I.

That at the time of the issuance of said bond, to-wit, on April 1, 1906, and at time of the various renewals thereof, as heretofore set forth, and as a condition of the issuance of said bond and the various renewals thereof, the said plaintiff did agree with the said defendant that it would from time to time make new and proper examination of the books and accounts of the said Mack A. Mitchell and the said Miners and Merchants Bank, to the end that any alleged loss because of any act of the said Mack A. Mitchell, fraudulent or otherwise, might be timely discovered and reported to this defendant. Notwithstanding said agreement, this plaintiff wrongfully failed and neglected to make from time to time, or at all any sufficient or other examination of the books or accounts of the said Mack A. Mitchell, or the said Miners and Merchants Bank; that had the said examination as agreed as aforesaid been

made, any alleged loss occasioned by any act of the said Mack A. Mitchell, if loss there was, would have been prevented.

And for another and fourth affirmative defense, against the matters and things set forth in Paragraphs 4, 5, 7, 8, 9, 11, 17 and 19, this defendant alleges:

I.

That the said alleged agreement, contract or promise set forth and referred to in said paragraphs, was not in writing, nor was any note or memorandum thereof at any time in writing signed by the parties to be charged therewith, or any person by it lawfully authorized or at all, and that said alleged agreement, contract or promise set forth and referred to in said paragraphs, is void under the provisions of Section 5289 of *Remington & Ballinger's Annotated Codes and Statutes of Washington.*

Wherefore, this defendant prays that it may go hence with its costs.

McCLURE & McCLURE and
HUGHES, McMICKEN,
DOVELL & RAMSEY,
*Attorneys for Defendant.*

STATE OF WASHINGTON, } SS.
COUNTY OF KING. }

John C. McCollister, being first duly sworn, on

oath deposes and says: I am the resident manager and statutory agent for the State of Washington of the above named defendant, and make this verification in its behalf. I know the contents of the foregoing Answer, and believe the same to be true.

JOHN C. McCOLLISTER.

Subscribed and sworn to before me this 13th day of July, 1914.

C. P. GOEMMER,
Notary Public in and for the State
(Seal) of Washington, residing at Seattle.

Indorsed: Answer. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 13, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

## REPLY OF PLAINTIFF.

Comes now the plaintiff and for reply to the answer of defendant, and for reply to the first affirmative defense of said answer, denies and alleges:

I.

For reply to paragraph III of said affirmative defense plaintiff denies the same and the allegations therein contained.

II.

For reply to paragraph IV admits that it gave no notice to defendant prior to the 9th day of December, 1913, but denies each and every other allegation and averment in said paragraph contained.

*SECOND.*

Plaintiff for reply to the second affirmative defense of the defendant denies and alleges:

I.

For reply to paragraph I, denies the same and the allegations of said paragraph as therein made and contained.

II.

For reply to paragraph II admits that on or about the date named the defendant tendered to plaintiff the premium of $62.50 and admits that said tender was by the plaintiff refused; admits the execution of the bond attached to the complaint of plaintiff and marked Exhibit "C" and admits the delivery of said bond by defendant to plaintiff, and denies each and every other allegation and averment in said paragraph contained.

The plaintiff further replying to defendant's second affirmative defense, alleges:

III.

That said bond marked Exhibit "C" and attached to the complaint of plaintiff was written and delivered by said defendant to the plaintiff as and of the 1st day of April, 1913, in pursuance of the agreement and arrangement between the parties hereto for the continuance in force of said fidelity insurance to plaintiff, as, for and on account of the said Mack A. Mitchell, as cashier of plaintiff bank, and was and is a continuation of said fidelity

insurance and contract. That same was written and delivered by the defendant to plaintiff as a part of and in pursuance with the agreement and arrangement existing between the parties hereto, as fully set forth in the complaint herein, and for the consideration of the premiums paid and without any further or additional application having been made therefor.

IV.

That there was a slight delay in the execution and delivery of said bond, but that said delay was caused by the neglect of defendant, and without notice or knowledge on the part of plaintiff. That same was caused through no fault or neglect of plaintiff, but was caused wholly through the fault, carelessness and neglect of the defendant in failing to keep and perform its agreements with plaintiff and by reason of the careless and negligent manner in which the defendant managed and conducted its business in connection with said transaction and bond. That defendant, although having at all previous renewals dealt with plaintiff's officers in Seattle, Washington, for the continuous period from April 1st, 1906, and having at all times collected its premiums from the officers of plaintiff in Seattle, Washington, did nevertheless wrongfully and carelessly and negligently and knowingly take up the matter of continuing said bond for the year 1914 directly with the said Mack A. Mitchell, and that instead of renewing said bond as it had agreed

and had been wont to do, did write to said Mitchell at Ketchikan, Alaska, inquiring if he, (Mitchell) wanted said bond renewed. That this communication with Mitchell was without the knowledge or consent of the officers of plaintiff and at a time when plaintiff was relying wholly upon defendant to renew said bond. That the said Mack A. Mitchell being then short in his accounts (of which the plaintiff had no knowledge) and knowing that he had breached and violated the terms and conditions of the bond, and that he had wrongfully removed, appropriated and embezzled the money, all fully as alleged in plaintiff's complaint, notified the defendant by letter that he, the said Mack A. Mitchell, did not want the bond renewed. That said notification on the part of the said Mack A. Mitchell was in writing to the defendant company and upon a letter head of the plaintiff bank, showing and stating that the officers of plaintiff were and at all times had been residents of Seattle and all gentlemen well known and known to the officers and representatives of defendant, and that said Mack A. Mitchell was not himself an officer of the bank. That all of this was without the knowledge or consent of the plaintiff and without any knowledge that anything was wrong with the accounts of said Mitchell. That immediately upon the discovery upon the part of plaintiff bank that there had been a delay in the renewal of said bond, it in turn called the attention of the defendant to the oversight and neglect of the

defendant in failing and neglecting to deliver to plaintiff its renewal bond; whereupon the defendant immediately recognized and admitted its oversight and neglect in the matter and did voluntarily and forthwith execute said bond (plaintiff's exhibit "C") to the plaintiff.

*THIRD.*

Plaintiff for reply to the third affirmative defense of the defendant, denies and alleges:

I.

For reply to paragraph I of said affirmative defense denies the same and the allegations and averments therein contained.

For a further reply to said third affirmative defense the plaintiff alleges:

That the defendant has fully waived the right to set up or plead the matters alleged in said affirmative defense and is estopped from making and asserting any such claim or defense for the following reasons and upon and following grounds, to-wit:

*FIRST:* That no such agreement, contract or arrangement as therein alleged and set forth was or is contained in or upon the policy of insurance or any renewal thereof, delivered to the plaintiff by defendant. That no agreement or arrangement of the nature pleaded has at any time been in the possession of the plaintiff and has never at any time

been by defendant delivered to plaintiff, its officers or agents, and no such agreement or contract as alleged and set forth in said affirmative defense has ever at any time during all the period mentioned in the complaint of plaintiff, been in the possession or under the control of plaintiff or within the knowledge of plaintiff, but that if any such agreement or arrangement was at any time attempted to be made, the same has been by the defendant at all times retained and kept by it in its possession and under its control.

*SECOND:* That it has at all times been well known and understood by defendant that the banking house of plaintiff has at all times been and is now located at Ketchikan, in Alaska. That it was at the time the original bond was written and has at all times since been well known to defendant that said bank was so located in Ketchikan, Alaska, and at a great distance from Seattle, Washington, the home office of the corporation, and that it would at all times be and has at all times been impractical, inconvenient, expensive and unreasonable to attempt to make such examinations of said bank or of the accounts of the cashier (who was at all times at Ketchikan) and particularly and especially such examinations or accounts as it is now alleged it was agreed should be made. That, therefore, defendant well knew and understood at all times that it would not be convenient, practical or reasonable to expect that such examinations or accounts would

or could be made, and that there was no agreement that any such examinations would be made. That the defendant well knowing the long distance which Ketchikan was and is from the city of Seattle, and that Mitchell was to be and operate the bank at Ketchikan, and well knowing and understanding all of the above and foregoing facts and conditions, and the manner in which the accounts were to be kept and examined, did write and deliver said bonds and renewals and accept the premiums therefor, well knowing and understanding that examinations such as it has now asserted should be made would never at any time be made, and that plaintiff had never contracted to make any such examinations Plaintiff alleges and asserts that it at all times fully complied with all the requirements of any agreement existing between itself and the defendant, regarding accountings by Mitchell, and with all provisions of the law in relation to any checking, verification or examination of the accounts of said Mack A. Mitchell, or said bank and at all times has fully kept and performed every promise, statement or representation made by it to defendant.

*THIRD:* That no written applications or statements or representations were at any time required by defendant or given by the plaintiff after April 1, 1906. That the defendant executed the successive renewals of said fidelity insurance from year to year without any written statement, representation or warranty or any written applica-

tion of any kind or character having been required or made by the plaintiff. That the defendant from year to year executed the new contracts of insurance and collected premiums thereon, and executed renewal certificates and did from year to year receive the premiums for said insurance without plaintiff having made or being required to make any representation, promise or guaranty in relation to the examination, verification or checking of the accounts of the said Mack A. Mitchell, and the plaintiff has at all times fully complied with all the terms, conditions and provisions of any and all agreements existing between it and the defendant, and all lawful requirements in relation to or in connection with the said fidelity insurance and bonds.

*FOURTH.*

For reply to the fourth affirmative defense the plaintiff denies the same and the allegations and averments therein contained.

WHEREFORE the plaintiff, having fully replied to the answer of defendant, prays for judgment as in its complaint.

JOHN W. ROBERTS,
*Attorney for Plaintiff.*

STATE OF WASHINGTON, }
} SS.
COUNTY OF KING. }

L. H. WOOLFOLK, being first duly sworn, upon oath deposes and says:

That he is the Secretary of Miners & Merchants

Bank, a corporation, plaintiff herein; that he makes this verification for and on behalf of said bank being thereunto duly authorized; that he has read the foregoing reply, knows the contents thereof, and believes the same to be true.

L. H. WOOLFOLK.

Subscribed and sworn to before me this 24th day of July, 1914.

JOHN W. ROBERTS,
Notary Public in and for the State of Washington, residing at Seattle.

Indorsed: Reply of Plaintiff. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 24, 1914. Frank L. Crosby, Clerk. By E. M. L., Deputy.

## DECREE.

This cause came on regularly to be heard before the Honorable Jeremiah Neterer, Judge, and a jury. The plaintiff was present in Court by John W. Roberts, its attorney, and the defendant by Hughes, McMicken, Dovell & Ramsey and McClure & McClure, its attorneys. Both sides having announced themselves ready for trial a jury was called and duly empaneled, accepted and sworn to try the cause. Opening statements were made to the jury by counsel for respective parties.

WHEREUPON Counsel for the defendant before the offer of any evidence upon the part of the plaintiff, moved the court to exclude from the con-

sideration of the jury all testimony upon any part of the allegations of the complaint of plaintiff, save and except such as should relate to any loss claimed under the bond bearing date of April 1st, 1913. After argument of counsel upon said motion the court sustained and granted the said motion of defendant, to which ruling of the court the plaintiff duly excepted and exception allowed.

THEREUPON The defendant offered, upon conditions stated in the record at the time, to allow judgment in favor of the plaintiff and against the defendant on account of the loss claimed by plaintiff upon the bond dated April 1st, 1913, for and in the sum of $688.27.

THEREUPON Counsel for the plaintiff asked permission to be allowed to prove and made offer to prove the fact, that the bond of April 1st, 1913, was a renewal bond and given in pursuance of previous arrangement and agreement for the continuation of the insurance and as a renewal and continuation of the former bond, and to prove the allegations of its complaint, to which offer of proof counsel for defendant objected on the ground that said contract of April 1, 1913, is a contract complete and unambiguous in itself and not subject to be enlarged or attached by extraneous evidence, and the further reason that such evidence would not be material or relevant to any of the issues, and the objection was by the Court sustained, to which ruling of the court the plaintiff duly excepted and exception allowed. It is therefore by the Court

ORDERED, ADJUDGED AND DECREED That the plaintiff, Miners & Merchants Bank, do have and recover of and from the defendant, United States Fidelity & Guaranty Company, judgment for and in the sum of $688.27, together with interest thereon at the rate of six per cent. per annum from the 9th day of December, 1913, until paid, and for all proper costs and disbursements of the action. To which judgment the plaintiff excepted and exception allowed.

Dated at Seattle, Washington, this 22d day of June, 1915.

ENTER: Jeremiah Neterer, Judge.

Indorsed: Decree. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 22, 1915. Frank L. Crosby, Clerk. By E. M. Lakin, Deputy.

## MOTION FOR NEW TRIAL.

Comes now the plaintiff, Miners & Merchants Bank, and makes this its motion for a new trial in this cause, and doth hereby and now move the court to vacate and set aside, and hold for naught, its former decision, order and judgment in this cause, and to grant a new trial to the plaintiff herein, for the reason and upon the ground that the Honorable Court erred—

1st. In sustaining the motions made by the defendant to exclude testimony on behalf of the plaintiff, and in sustaining the motions of the de-

fendant to exclude all testimony except such as related to the bond of April 1st, 1913.

2nd. In sustaining the motion of defendant to exclude the testimony touching any alleged loss occasioned by any wrongful act or conduct of Mack A. Mitchell, occurring prior to April 1st, 1912.

3rd. In sustaining the motion of defendant to exclude all testimony touching any alleged loss occasioned by any wrongful act or conduct of Mack A. Mitchell, occurring prior to April 1st, 1913.

4th. In refusing to allow the plaintiff to offer proof to sustain the allegations of its complaint, and in refusing to allow plaintiff to introduce evidence to establish the facts which it offered to prove.

5th. In excluding the offer of testimony on behalf of the plaintiff to prove the allegations of its complaint and to prove that the bond was at all times during the periods named in the complaint, renewed and continued in force, and in refusing to allow plaintiff to prove that the bond of April 1st, 1913, was a continuation and renewal bond, and by agreement between the parties was to be at all times so treated and understood.

Dated June 4th, 1915.

JOHN W. ROBERTS,
GEORGE L. SPIRK,
*Attorneys for Plaintiff.*

Indorsed: Motion for New Trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 15, 1915. Frank L. Crosby, Clerk. By E. M. L., Deputy.

## ORDER OVERRULING MOTION FOR NEW TRIAL.

This cause having come regularly on to be heard upon the motion of the plaintiff for new trial, before the Honorable Jeremiah Neterer, Judge of this Court, and the Judge who tried the cause, plaintiff being present by John W. Roberts and George L. Spirk, its attorneys, and the defendant by Hughes, McMicken, Dovell & Ramsey, and McClure & McClure, its attorneys, and the Court having heard the argument of counsel, and being fully advised in the premises, doth

OVERRULE and DENY the motion of the plaintiff for new trial, to which ruling, the plaintiff duly excepted and exception allowed.

Dated this 21st day of June, A. D. 1915.

Enter: Jeremiah Neterer, Judge.

O. K.—W. T. Dovell.

Indorsed: Order overruling motion for new trial. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 21, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

*In the District Court of the United States for the Western District of Washington, Northern Division.*

No. 2750.

MINERS & MERCHANTS BANK, a corporation, *Plaintiff,*

*vs.*

UNITED STATES FIDELITY & GUARANTY CO., a corporation, *Defendant.*

## PLAINTIFF'S PROPOSED BILL OF EXCEPTIONS.

BE IT REMEMBERED, that heretofore and on, to-wit: the 9th day of June, 1915, the above entitled cause came regularly on for trial in the above entitled court before Honorable Jeremiah Neterer, Judge Presiding;

The plaintiff appearing by John W. Roberts, Esq., its attorney and counsel;

The defendant appearing by Henry F. McClure, Esq., of Messrs. McClure & McClure, and by William T. Dovell, Esq., of Messrs. Hughes, McMicken, Dovell & Ramsey, its attorneys and counsel;

Whereupon, the following proceedings were had and done, to-wit:

A jury was duly empanelled and sworn to try the cause;

Whereupon Mr. John W Roberts, attorney for the plaintiff, made the following opening statement to the jury:

MR. ROBERTS: May it please the Court, and

you, ladies and gentlemen of the jury:

This case is somewhat complicated, and I desire to state to you as clearly as I may at this time just what we expect the evidence will develop. To begin with, the Miners & Merchants Bank was organized for the purpose of transacting a banking business at Ketchikan, Alaska. It had a paid up capital stock of $30,000.00, with an authorized capital stock of $50,000.00. At the time it began its banking operations it procured the defendant in this action to write a surety bond, or, what is known as a fidelity bond, upon its cashier, Mr. Mack A. Mitchell, who was to be in charge, and who was in charge, and in entire charge, of the operation and management of the bank at Ketchikan, Alaska. The officers of the bank were Mr. James F. Lane, Mr. L. H. Woolfolk, who sits here, and Mr. Andrew Chilberg. Those gentlemen all live in Seattle. They constituted its board of trustees from the time of its organization until the 29th day of November, 1913, when one change was made in the board of trustees, Mr. Ed Chilberg taking the place of Mr. Andrew Chilberg. But Mr. Ed. Chilberg was not an officer of the bank, nor a trustee, nor connected in any way with its management, until November 29th, 1913. This bond was procured, as I said, at the beginning, and guaranteed, as we contend, the bank against any loss through any

fraud or dishonesty on the part of Mr. Mitchell, which the bank suffered or sustained.

This bond was renewed from year to year. We allege, and expect the evidence to show to you, that the arrangement and agreement was made at the time the bond was written, that the agents of the surety company should, from year to year renew the bond. The company did renew the bond from year to year, each time renewing it before the expiration of the year, and that the bond continued in force until after the occurrences for which the action is brought.

Mr. Mitchell went to Ketchikan, Alaska, which is a distance of some six hundred miles from Seattle. In our complaint, I notice, we have alleged four hundred miles, but as a matter of fact, it is something over six hundred miles away from Seattle. It was at all times known to the surety company that the business of this bank was to be transacted in Ketchikan, Alaska, and that Mr. Mitchell was to transact that business at Ketchikan, Alaska; and Mr. Mitchell went to Alaska, and made his home there, and has lived there in Alaska from that time until the present. He remained as cashier of the bank until discoveries were made which brought about this suit, when he was removed from that position. Now, we expect that the evidence will disclose that some time in the latter part of 1910, or early in the year 1911,

Mr. Mitchell entered into an arrangement with one Wurzburg, whereby Mitchell and Wurzburg formed a corporation. That corporation was to be known as the Revilla Reduction Works. It was to have a capital stock of $10,000.00, and in the minutes of their meetings it is set forth that Mr. Mitchell was to be a trustee and secretary and to be paid, and to have and receive for his service in financing this company, and in assisting to promote it, sixty shares of the capital stock of that corporation, to be issued to him fully paid. That Wurzburg was to have for his services in promoting this corporation, another part of the capital stock, and then they recited that the capital stock of the corporation to the amount of $6,000.00 was fully paid. They were going to engage, so they said, in making oil out of shark livers. They were going to catch sharks and take their livers and make oil out of the shark livers. So they bought a boat and paid $25.00 for the boat, to go out and catch the sharks. Then Mr. Wurzburg borrowed $3,500.00 from the bank. He had borrowed that before, I should have stated. He borrowed that before. That was checked out, how, we cannot tell, because, while we have the books, they do not show how that money was checked out. But anyhow, they employed a carpenter to build a shed. He built the shed. This corporation gave him its note for $800.00, and Mitchell for the

bank immediately took up that note. Then they turned the shed in for about $4,000.00 to help pay up the capital stock of the corporation. Then this $3,500.00 that had been borrowed by Mr. Wurzburg, was paid back by giving the note of the fish company to the bank to take up Wurzburg's individual note. Then they said that, "we have four hundred shares of stock here that have not been paid for." They called that preferred, and turned it over, they say, to the bank. They took, themselves, the paid up stock, and turned over to the bank that that was not paid, to secure the bank for these notes. But we expect the evidence will show you that, as a matter of fact, not one dollar was ever paid of that capital stock, and that nothing went into this shark liver oil company, except what was taken from the bank, and all this appears in minutes over Mr. Mitchell's signature. They went on with this shark liver oil business for a while, and the sharks refused to come in and deliver up their livers, so they held a meeting and recited that the business had proven a failure, because they could not catch enough sharks. They couldn't get sharks but they got the bank all right, up to that time, to the extent of sixteen or seventeen thousand dollars. At the very time that they recited that the shark business had proven a failure, they owed the bank between sixteen and seventeen thousand

dollars. So, then, they got together and said, "This business is a failure, because we cannot catch sharks. We will start a new one." And they did start a new one, and they called that, —they simply changed the name. They did not organize a new company, but they changed the name of the shark liver company, and called it Revilla Fish Products Company, and they were going to make fish pudding. Then they started in to make fish pudding. Now, they had borrowed up to that time, some six or seven thousand dollars more than their entire capital stock, and more than half of the paid up capital stock of the bank, so I think that it probably did not look well to them; but the evidence will show that anyhow they said, "We will increase our capital stock now." So they recite that they increased the capital stock. Of course, they didn't get any more money into it, but they just increased the capital stock. Now, at first Mr. Mitchell took notes to the bank for the money that he put into this corporation from the bank. He took notes up to the value of $6,000. Then he stopped taking notes, but he drew through his fish corporation, overdrafts on his bank. And from that time on, these overdrafts, from day to day, accumulated until the overdrafts alone amounted to more than $40,000. Now, these overdrafts, you will bear in mind, were all in addition to the money which

he had loaned, and for which he took the notes. We will eliminate practically, the notes, so far as the charges here are concerned, because the notes were entered by Mr. Mitchell in the books of the bank, as loans. But these overdrafts were never entered in the books of the bank, and were at all times concealed from the officers of the bank. Mr. Mitchell, the evidence will show, in order to cover up these overdrafts that he was taking out for his shark and fish pudding scheme, concealed it by falsifying the books of the bank; that he not only falsified the books of the bank, but he falsified the reports required to be made annually to the government. He, being at this great distance, was at Seattle, I think, only twice during the period covered by these transactions. But under the law of Alaska a sworn report must be filed by the bank each year. Mr. Mitchell prepared those annual reports. They are in Mr. Mitchell's handwriting. He would, however, send them down here to Seattle, because they had to be sworn to by the president of the bank, and by the secretary of the bank under the law. Mr. Mitchell would make out these reports and send them to Seattle, with the exception of two occasions when he came down personally. And he had sent them all prepared ready for Mr. Chilberg and Mr. Woolfolk to sign and swear to, with a letter which said to them that this

was a correct report. And when he was down here, he in person told them that the reports were correct. Mr. Chilberg,—Mr. Andrew Chilberg, and Mr. Woolfolk, relying upon Mr. Mitchell,—and I might digress here to say to you that Mr. Mitchell was well known to these gentlemen before he went to Alaska. They took him from the Scandinavian American Bank as a trusted employe there, and, having every confidence in Mr. Mitchell, sent him up there at this great distance, and put him in complete charge of this banking business. So, when Mr. Mitchell told Chilberg and Mr. Woolfolk that those reports were correct, they believed it. They relied upon it, and they swore to them and sent them to Alaska and filed them from year to year. Those reports, as a matter of fact, were false. Never, in any of those reports, were these overdrafts mentioned. Never, in any of Mr. Mitchell's letters and reports from time to time to the bank, were they mentioned. Never did he tell them of his connection with the fish companies. Never did the officers of the bank know anything of the transactions. Mr. Mitchell, when he was here in person, told them that those reports were correct, and told them that he never had had an overdraft in the bank.

Mr. Mitchell made a loan to one Rudd, and to secure that loan he took a gold watch. He made another loan to another gentleman, and

took some jewelry as security. He kept that watch and that jewelry for a certain length of time, which will all be disclosed to you here. Then he charged these two notes to expense account, took the jewelry and traded it off for a phonograph and some records, of the value of $225.00, and took the phonograph to his own home, and has it there at this time, so far as we know. He never made any accounting of any kind to the bank, never charged these notes off to profit and loss, but charged them into the expense account of the bank, and himself received and kept the proceeds of the jewelry which had been put up to secure those notes. There are some other transactions, perhaps, that will develop, but the overdrafts are the chief ones. Now, the officers of the bank, early in December, learned that perhaps all was not right with the bank, and they discovered that there was a run on the bank. As I said, the bank up to this time, never had more than $30,000.00 of paid up capital, while Mr. Mitchell had turned over to his shark fish company more than $50,000.00 from the bank with a capital stock of only $30,000.00, which meant he was giving his fish company, the stockholders and depositors money. An expert accountant, Mr. Larson, was sent up, and after some days there, in talking with Mr. Mitchell, and examining the books, of the bank, he discovered that he

was unable to balance the books. Whereupon, Mr. Mitchell said to him that he had something back in the vault which would make them balance. And when Mitchell went back into the vault and brought out some sheets of paper, and on those sheets of paper he had a memorandum of these overdrafts, showing, so far as we know, a correct list of the overdrafts. That is to say, we only know what those sheets of paper show,—those sheets we have, and they will be in evidence before you. These overdrafts were not in the books of the bank, had never been entered into the books of the bank, and were not in the books of the bank at that time. Later, when Mr. Mitchell was asked why he had concealed these transactions, he stated that he did so because he knew he would not have been permitted to do it, and that he knew that it was wrong, and that it had been a source of great worry to him, etc. Now, we then gave notice, as the evidence will show, to the surety company. The bond was first written in 1906, and renewed each successive year, including the year 1913, and until April 1, 1914, and the premium paid to the company by the bank. The bank paid that premium, not Mr. Mitchell. The bank procured the bond itself, and paid the premium. Upon taking the matter up with the surety company it denied liability, and denies it now, and this action has been brought

to recover, not all the loss sustained, but $25,000.00, because $25,000.00 is the full penalty of the bond. While the loss to the bank has been more than $50,000.00 we can recover only $25,000.00, because that is the amount of the bond. So, we are asking now, to recover here at your hands, $25,000.00 with interest, which is the penalty of the bond.

Whereupon, at the conclusion of the opening statement to the jury, by Mr. Roberts, the following opening statement to the jury, in behalf of the defendant herein, was made by Mr. Dovell:

MR. DOVELL: If the Court please, and ladies and gentlemen of the jury: I desire particularly to make a statement which will disclose the facts which the defendant expects to be developed in this case, and I desire particularly to make it this evening, in order that you may not regard the statement which counsel has made, if your impression is as erroneous as the one which I fear has been left upon your mind by his remarks.

The proposition to which I desire to call your attention particularly, is the one which has been so gracefully passed over by counsel. I expect the evidence to show you that the plaintiff, the Miner's & Merchant's Bank, had no bond of our company. In order that that may be demonstrated to you, it will be necessary that these facts be developed: In 1906 the Miner's

& Merchant's Bank was organized at Ketchikan, Alaska. It was organized by the Scandinavian-American Bank here. Now, the Scandinavian-American Bank is a state bank, and therefore cannot hold the stock of any other bank. So the stock was taken, I believe in the name of Mr. Chilberg, Mr. Woolfolk, and Mr. Lane; but the Miner's & Merchant's Bank of Ketchikan belonged to the Scandinavian-American Bank here, and that was a matter of common knowledge. The Scandinavian-American Bank sent to Ketchikan, to manage that bank there, a Mr. Mack Mitchell, who for a long time, had been in their employ, and for whose business acumen and integrity they were willing to vouch. They sent him up there, and armed him with full authority to conduct the business of that bank at Ketchikan, and during all the time he was there, from 1906 until 1913, made, I believe, but one examination of his accounts, and that was in the early part of his regime there. Such was the trust and confidence they had in him. In 1906 the defendant surety company was represented in Seattle by Calhoun, Denny & Ewing. Calhoun, Denny & Ewing, at that time, I believe, did the bonding business for the Scandinavian-American Bank. One of the officers of that bank, Mr. Woolfolk, I think it was, went to our representative, Calhoun, Denny & Ewing, and secured a bond, which was

the usual bond, paying a premium, I think, of a hundred dollars. Now that bond provided that we should be liable for any loss or injury the Miner's & Merchant's Bank would suffer because of the fraud or dishonesty of Mr. Mack Mitchell, amounting to larceny or embezzlement. Now, you understand, it must be such fraud or dishonesty as by the terms of that bond would constitute larceny or embezzlement. The bonds terminated on the 1st of April of each respective year. The bonds secured in 1906 terminated, I believe, April 1st, 1907; the bond of 1907 terminated April 1st, 1908; and the bonds terminated thereafter respectively on April 1st, 1909; April 1st, 1910; April 1st, 1911; April 1st, 1912. And notice would be sent by our representative, then Calhoun, Denny & Ewing, stating that the bond was about to expire, and a blank form of application would be enclosed; they would fill out the application, and by that application, notify us they desired the bond renewed,—at all times, up to and, I think, including the year 1910. They attached to this application for a renewal, a certificate that they had been examining the accounts of Mr. Mitchell, and that in all respects they were correct, which statements, as I said, of course, were not true. Acting upon that application we issued what is called a renewal slip of the bond each year during these years, the last one

being issued April 1st, 1912. Now, the latter part of 1912, or the early part of the year 1913, —and you will notice, of course, that the last renewal slip would thus carry that bond I speak of down to April 1st, 1913,—some short time before 1913 we changed our agent here, and the new agent, a Mr. McCollister, left the Alaska Building and took up his quarters in the Hoge Building. Now, the interest in the Scandinavian-American Bank in the Alaska Building, of course, is a matter of common knowledge, and upon the removal of our agent from the Alaska Building to the Hoge Building,—and it was entirely legitimate,—the Scandinavian-American Bank took their business from us and gave it to another bonding company which has its offices in the Alaska Building. All the bonds which we had with the Scandinavian-American Bank, or any of the concerns in which it was interested, were terminated,—that is, they permitted us to write no new bonds at all. Now this was some time before April 1st, 1913. April 1st, 1913, or shortly before, however—we followed the usual custom as we do with all bonds—our agents sent them the usual notice that their bond was about to expire, and it was addressed to the Miner's & Merchant's Bank, Ketchikan, Alaska, that being the bank which was bonded. The notice was received, of course, by Mr. Mack Mitchell himself, who was the only

one in the bank at Ketchikan. He, thereupon, notified us that they did not desire a renewal of the bond. We supposed, of course, that they were simply following the course with that bond that they had followed with all the rest of the bonds,—that is, transferred the business to someone else. So this bond, which contained a provision that we would be liable for any loss, only provided that it was discovered during the continuance of the bond, or within six months thereafter. Now that bond contained that provision,—and the reason for that provision, of course, is evident to you,—requiring the banks to make the proper examination in order to determine whether or not their servants are being honest. Bearing that out, we were not liable under that bond which expired April 1st, 1913, unless they discovered the loss within six months. Bear in mind these facts. Along the latter part of May, this Mr. Wurzburg, of whom Mr. Roberts has spoken, came to Seattle. He came with a letter of introduction from Mr. Mack Mitchell. Mr. Mack Mitchell had been down himself and had seen the officers of the bank during the early part of the year. He knew that Mr. Wurzburg was to come down a little later, and so gave him a letter of introduction, and he gave him a letter of introduction to the directing officer,—the head of the bank, Mr. Ed Chilberg. When Mr. Wurzburg

came down he was delayed somewhat by reason of the fact that he had to take a trip to San Francisco before he could take the matter up with Mr. Chilberg, and some time in May he took the matter up with Mr. Chilberg, and told Mr. Chilberg that he owed the Miner's & Merchant's Bank a certain sum of money, and, presumably told him all the circumstances of the transaction. In any event, we find Mr. Chilberg writing to Mr. Mack Mitchell immediately,—I think his letter is dated the early part of June,—desiring that Mr. Mack Mitchell tell him the details, and tell him how much was owing from this company which Mr. Wurzburg represented to his bank. And at once Mr. Mack Mitchell disclosed all the circumstances to him; told him that the company Mr. Wurzburg represented owed the bank some $50,000. Then they either knew, or they could have known all about the transaction, but they let it go until it came some time in November,—until the time came when the bond which we had given them had expired, when the six months had passed, and the bond was absolutely dead. Then in November some time they come to us and say, "How is it that that bond was not issued in April? We wanted that bond." Of course they had not paid any premium for any bond, but they said, "We want that bond, and will you kindly write it and date it back to April 1st?"

They told us nothing whatever of the fact that Mr. Wurzburg's Company owed them $50,000. They told us nothing whatever of these circumstances, which, as Mr. Chilberg said in his letter, did not look good to him,—told us nothing of that kind, but concealing that from us, secured a bond dated back to April 1st, and within a few days thereafter claimed payment from us for this loss, which, manifestly, is sought to be recovered upon two bonds,—upon the bond of April 1st, 1911, and upon the bond of April 1st, 1912, which were absolutely dead before they secured that new policy of insurance. And when they came to us the last time they did not ask for a renewal of the old bond. They secured from us an entirely different character of a bond, a new form of bond, a bond, if you please, which would make us liable for any act of fraud or dishonesty of Mr. Mack Mitchell, whether it amounted to larceny or embezzlement or not. In that way, you will observe how we were tricked into writing the last bond. Now, the proposition concerning those bonds, and our liability under those bonds,—our possible liability on those bonds under that state of facts, will be matters of law which I want to present to the court. I need not tell you any more about the facts relative to these bonds.

Very briefly, these are the facts, as nearly

as we know, concerning the relations of Wurzburg and his company and Mr. Mack Mitchell. Mr. Mack Mitchell will be here and will go upon the witness stand, and Mr. Wurzburg, I presume, if the case reaches that point, will disclose the whole transaction. One of the principal industries of Ketchikan, of course, is the fishing industry. Mr. Wurzburg came to Ketchikan. He was a man who had been engaged in the fishing industry in one form or another all his life. He understands it thoroughly, and has been very successful in other places. He has handled large amounts of money in the fishing industry in other points along this coast. He came to Kitchikan with a plan which had been agitated for quite a length of time,—a plan for catching fish, which, as I understand it, came to devour the filth from the canneries, and take the fish and the sharks,—catching them and utilizing a part of them,—the liver,—for the oil, the rest of the fish, as I understand it, to be converted into fertilizer. That was his plan, and he started building in a small way the institution there where he could manufacture this fertilizer, and this oil. He found that was unsuccessful because the run which had been there for years had, for some reason, disappeared entirely. When he began this small plan he convinced Mr. Mitchell that it would be developed into an industry

which would be profitable to that community. And I am convinced that when you hear his testimony you will believe there was excellent reason for that conclusion. But when it was found that the fish could not be secured for this fertilizer, and for making the oil, it was determined to enter upon the manufacture of some food product, to be made out of fish. They then, of course, had to increase their plant. They did develop a food product, called a fish loaf, put up in cans. They had to change their plans. Wurzburg found, as is usually the case, that he had spent a great deal more money than he anticipated, the great difficulty being that he could not get this fish product upon the market until he had spent a certain amount of money for advertising, to introduce it to the trade. Mr. Mitchell, believing that it was a venture which would be successful, had honored his overdraft, and had permitted him to draw for a certain amount. He owed the bank that money. Mitchell became convinced that the only way for the bank to get its money was to keep on putting more money in. And he followed that experience, which is not unusual or uncommon,—putting in good money after bad, until the overdraft had reached, as Mr. Roberts has told you, a sum in excess, I believe, of some $40,000. The evidence will disclose to you that Mr. Mitchell did not, at any time, make any

effort to conceal these overdrafts. The way he kept his books, which is a way which is not uncommon,—the overdrafts are carried as a separate item, and there was no place for them in any of the reports which he made here. The evidence will show you there were various other overdrafts. There were overdrafts which the Scandinavian-American Bank here knew of, and they were not included upon this report. And an item of earnings of the bank, the interest which was being charged upon these overdrafts, was sent down to the Scandinavian-American Bank, and they saw that item of interest, and they saw what they were earning, and they must have known they were earning a large part of it on these overdrafts. As far as the statement that he concealed the sheet showing these overdrafts in the vault is concerned, he had a system,—a loose leaf ledger system, and so when he removed the sheets from time to time as they had been used, they were, as I understand it, placed in another part of the bank, and that is what Mr. Roberts means when he declares that the attention of this expert was called, finally, to the papers upon which the record of the overdraft were concealed in another part of the bank. So, upon that statement,—and there are many other facts, of course, which I cannot go into in detail now, we expect to

establish first: that the Miner's & Merchant's Bank were not insured, and knew they were not insured with our company at the time this loss was discovered, or within six months thereafter, so that there is no liability for that reason upon the bond. And I expect further the evidence to justify this conclusion, that the venture made by Mr. Mack Mitchell for the Miner's & Merchant's Bank, was made in good faith. By the way, it is a fact that Mr. Wurzburg, when he organized his company there, induced, not only Mr. Mack Mitchell, but several other local parties to go into the corporation, and, as is the custom, gave them a small amount of stock so that they could act as directors. But the evidence will disclose that Mack Mitchell never did, nor did he ever expect to get a dollar of profit out of any money which he permitted the Miner's & Merchant's Bank to advance to this enterprise. And the evidence will, therefore, disclose that this transaction, while it may have been a poor business venture, was nothing more,—did not amount to fraud or dishonesty,—to that fraud or dishonesty which is larceny or embezzlement. Mr. Mitchell has never been proceeded against. He is not only a free man, but today is city treasurer of Ketchikan.

MR. ROBERTS: I would like to make a short reply statement, which I am willing to do now or in the morning, as Your Honor sees fit.

MR. DOVELL: I don't think it is customary to make a reply statement.

THE COURT: I think not, if you set forth your own contention, and counsel rebuts that, it is all.

You, ladies and gentlemen of the jury, will bear in mind the admonitions which I have heretofore given you, and we will take a recess until 10:00 o'clock tomorrow morning.

Whereupon, at 5:00 o'clock p. m. further hearing was continued until Thursday, June 10th, 1915, at 10:00 o'clock a. m.

THURSDAY, JUNE 10th, 1915.
10 o'clock a. m.
TRIAL RESUMED.

(Calling roll of jury waived, by agreement of counsel.)

(Thereupon, by direction of the court, the jury retired from the court room.)

MR. DOVELL: If the court please, I think we can very materially abbreviate this hearing, if the court will hear two motions, which I have to present at this time. Having in mind the pleading and the opening statement of counsel, I move to exclude the testimony touching any alleged loss occasioned by any wrongful acts or conduct of Mack A. Mitchell, occurring prior to April 1st, 1912, for the reason that it appears from the complaint that no discovery

of said alleged loss, or wrongful acts or conduct, was made within six months from April 1st, 1912, the same being the date of the expiration of the bond and renewal, dated April 1st, 1911. And I also move to exclude any testimony touching any alleged loss occasioned by any wrongful acts, or conduct of Mack A. Mitchell occurring prior to April 1st, 1913, for the reason that it appears from the complaint that no discovery of said alleged loss or wrongful acts or conduct was made within six months from April 1st, 1913, the same being the date of expiration of the bond and renewal dated April 1st, 1912. I also move to exclude any testimony as to the so-called oral contract which is set forth in the complaint, for the following reasons: —Your Honor will note, although I don't think reference was made to it by counsel in his opening statement, that in the complaint there is pleaded an oral contract to the effect that we should furnish to the plaintiff the most favorable form of insurance policy. Your Honor will note that in the pleading. Now, I move to exclude any testimony with regard to such contract for the following reasons—

MR. ROBERTS: I might say, Your Honor, that I do not expect to offer any evidence upon that allegation.

MR. DOVELL: All right, then, I will not have to make the motion. That being out of the

case, it will be considerably simplified. Now, Your Honor will note, if Your Honor will turn to the first exhibit attached to the complaint, that in 1906, there was issued to the plaintiff a bond, which provided that we should be liable for "such pecuniary loss as may be sustained by the employer by reason of the fraud or dishonesty of the said employee in connection with the duties of his office or position, amounting to embezzlement or larceny, and which shall have been committed during the continuance of said term, or of any renewal thereof, and discovered during said continuance, or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said employee from the service of the employer." Then follows further on in the bond this provision: "That the company, upon the execution of this bond, shall not thereafter be responsible to the employer, under any bond previously issued to the employer, on behalf of said employee, and upon the issuance of any bond subsequent hereto upon said employee in favor of said employer, all responsibility hereunder shall cease and determine, it being mutually understood that it is the intention of this provision that but one (the last) bond shall be in force at one time, unless otherwise stipulated between the employer and the company."

Now, Your Honor will note that each year following April 1st, 1906, there was issued a renewal, which provided—and, by the way, if Your Honor has before you Exhibit "B," it has been agreed by counsel and myself that there is a mistake in that.

THE COURT: In what respect?

MR. ROBERTS: A mistake was made in copying it Your Honor. Just a clerical error.

MR. DOVELL: "For the period beginning the 1st of April, 1911," and ending—

MR. ROBERTS: "Subject to the covenants and conditions"—

MR. DOVELL: Right before "subject to the covenants,"—

THE COURT: Yes.

MR. DOVELL: What is the word there?

THE COURT: "Beginning the 1st day of April, 1911, subject to the covenants."

MR. DOVELL: What is there omitted, Mr. Roberts?

MR. ROBERTS: I think the omission is above there: "Beginning the 1st day of April, 1910"—

THE COURT: 1911?

MR. ROBERTS: 1911.

THE COURT: Yes.

MR. ROBERTS: "1911, and ending"—

THE COURT: And ending?

MR. ROBERTS: "On the 1st day of April, 1912."

That should go in there. The next word is "subject."

THE COURT: "Subject to the covenants."

MR. ROBERTS: Yes.

MR. McCLURE: That begins on the 1st day of April, 1911, and ends on the 1st day of April, 1912?

MR. ROBERTS: That particular one; yes.

MR. McCLURE: I thought you read it that it began on the 1st day of April, 1910, and ended on the 1st day of April, 1911.

MR. ROBERTS: I started to read that, but I had the other one,—and the one before the court—

MR. McCLURE: Each renewal or continuation certificate is for one year.

MR. DOVELL: Your Honor will note that the renewal certificate contains the provision that it is to be subject to all the covenants and conditions of the original bond. Now, that was continued, according to the allegation of the complaint until the last renewal certificate was issued, April 1, 1912, thus carrying the bond to April 1st, 1913. Now, if Your Honor will note, the next Exhibit, you will find that there is a bond dated April 1st, 1913.

THE COURT: That is Exhibit "C"?

MR. DOVELL: Exhibit "C." You will note that it is a bond of an entirely different character issued by the same company, but containing entirely different covenants. Now, we have

the plaintiff in the peculiar position of suing upon the bond of 1911 and the bond of 1912. According to the statement of counsel, this so-called defalcation began in 1911, and continuing through 1911, through 1912, ran into 1913,—a small amount of the so-called defalcation was during the time of the last bond. But, according to the pleading, it appears the discovery was not made until December, 1913, and it is my position,—and I can see no escape from it,—that all liability upon the bond dated, or evidenced by the renewal dated April 1st, 1911,—that all possible liability on that bond terminated six months after April 1st, 1912; and all possible liability upon the bond dated April 1st, 1912, terminated six months after April 1st, 1913, provided no discovery was made. Now, Your Honor will note the date that it is alleged the discovery was made. That is, about the 9th day of December, 1913, the plaintiff, Miners & Merchants Bank, discovered certain facts in relation to the said Mack A. Mitchell. Note, if you please, again the provisions of the bond, which say the company shall be liable for any loss which may be sustained and discovered during said continuance,—that is, during the continuance of the term of this bond or any renewal thereof, or within six months thereafter, or within six months from the death, or dismissal or retirement of said employee. Now,

it seems to be the theory of counsel, that this bond having been renewed from time to time, operates as a continuous obligation. That, undoubtedly, is his theory, and, of course, Your Honor will have difficulty in shutting your eyes to the character of the transaction, and Your Honor will not fail to understand why they sought to get this last bond: they thought it would operate as a renewal of the old bond. In other words, there had come a time in October, 1913, when the bond had terminated,—when the six months period during which they had to discover a loss had terminated,—when all relations between the parties had terminated,—and the bond, so far as any responsibility or liability was concerned, was absolutely dead. Now, someone conceived the idea that by going to the company, and getting a new bond, they could revivify that old obligation. The idea might have ingenuity, but it had no logic. That bond,—the last bond,—the last renewal was absolutely dead. There was no responsibility or liability upon it. No discovery of any loss had been made within six months from the time that bond terminated. Now, how anyone could conceive the idea that he could give life to that old obligation by getting a new bond,—not a renewal at all, if Your Honor please, but by getting a new bond,—I cannot conceive; and, fortunately, we are not without authority upon the question.

The matter has been squarely decided by the Circuit Court of Appeals, in the Second Circuit. I gave a note of this authority to Your Honor.

THE COURT: I read the case.

MR. DOVELL: Your Honor had occasion to examine it? Now, Your Honor will note that there was a bond, and it was renewed from time to time, and Judge Shipman, in writing the opinion, takes up the items of loss, as they occurred each year. Now, Your Honor will note that there was a bond which contained almost identically the same provision that our bond contained: that there should be but one bond in force at a time. The provision in that bond was this: "And it is agreed further that the company, upon the execution of a stipulated amount of risk or insurance under the terms of this bond in behalf of any employee, shall not thereafter be responsible to the employer under any previous insurance of said employee, it being mutually understood that it is the intention of this provision that but one (the last) insurance of the employe shall be in force at one time, unless otherwise provided."

That is practically the same provision as is in our bond.

Judge Shipman says in the beginning of his opinion,—and this is what he bottoms his opinion upon,—

(Reads from opinion.)

Now, if Your Honor will give the matter a moment's thought, you will understand why the contract must be that way. I venture to say that no liability company could do business and write contracts otherwise. If the contract is as counsel seems to think it is,—a continuous liability, kept alive all the time by these renewals from year to year,—then, there might be a loss,—there might be a defalcation today and and twenty years from now, a liability might be imposed upon the company. No insurance company could do business in that way. No insurance company would know where it was at,—would know what liability it might have to meet. And, for the same reason, if a contract of that kind was kept alive year by year, by renewal, a bank would not exercise those precautions which are necessary to be exercised, not only for our protection, but for the protection of the stockholders and the depositors, and the public generally who do business with the bank.

Just the same thing, if Your Honor please, would occur generally as occurred in this bank, —a man would be sent there to do business, and left there year after year, and no attention would be paid to him, the precaution never being taken to examine his books. Now, it is just for that reason, if Your Honor please, to require that one who secures an indemnity bond upon an employe, shall investigate his conduct

and his books, if he keeps books, at certain periods, and discover whether or not there is any flaw in his integrity. They have all the time while that bond is in force, and they have six months thereafter to make an examination and a discovery, and if they do not, then the liability of the company is at an end. Your Honor can readily see that no liability company could write a policy unless it had some such provision. It would never know that its liability had terminated.

Now, Your Honor will note if you have given attention to this *Florida Central* case (*Florida Central and P. R. Co. vs. American Surety Co. of New York,* 99 Fed. 674) that the only way that the bonds differ is that this was a stricter bond in this case,—it required that the discovery be made during the continuance of the bond,—while the term of the bond still existed, or six months after the death, or dismissal of the employe. Now, our bond is a slightly more liberal bond, inasmuch as it allows six months after the termination of the bond for the discovery. It strikes me that Your Honor would not care to depart from the ruling of the Circuit Court of Appeals of the Second Circuit. While, of course, I do not pretend that Your Honor is bound by that ruling, still it is always desired, I believe, to escape conflict in the different circuits.

In the case of *United States Fidelity & Guaranty Co. vs. Williams,* 49 Southern, 742, a Mississippi case, the court had before it, a bond, I believe, identical with ours. It was a case against the same company. As I understand the case, it was not alleged in the complaint at what time the shortage occurred, and a demurrer was interposed on that ground. Inasmuch as the opinion contains an analysis of the policy, I will take the liberty of reading a portion of it:

(Reads from opinion.)

Now, this is all to the point that each renewal constitutes a new and separate contract, and not, as counsel seems to think, one continuous contract running from the date of the first policy.

In *Brady vs. Insurance Company,* the court said:

(Reads from opinion.)

That is the point exactly. It did not increase or change the time within which they were required to examine their books, and discover this loss during the continuance of the term, or six months thereafter.

(Resumes reading.)

Now, that was their contention. This is what the court said:

(Reads from opinion.)

The court says: "See, also," a case in the

110 Tenn., and a case in the 124 Federal, which I have here.

(Resumes reading.)

The case is directly in point.

I have also a decision by Judge Newman, sitting in the Northern District of Georgia, in a case entitled *Proctor Coal Company vs. United States Fidelity & Guaranty Company,* 124 Federal, 424. Did Your Honor examine this case?

THE COURT: I examined both of them.

MR. DOVELL: Then, there is no reason why I should take up your time, further, except to call your attention to the fact that upon a bond, the language of which appears to be identical with ours, the same contention was made. They say:

> "It is contended by the plaintiff in this case that the effect of this original bond and the two renewals, taken together, was to create a continuous obligation. Counsel for plaintiff insist that certain language in the bond shows, and the character of the transaction indicates, that it was intended that the Proctor Coal Company should be insured against any dishonesty on the part of Stanton, occurring at any time from December 1, 1898, up to December 1, 1901, discovered during such period of continuous insurance, or within six months from the expiration of such period."

Then the Court seems to hold that that contention cannot be sustained. The language of the bond is identical and the case is directly in point.

Now, it is without doubt, the theory of counsel that this bond, being first taken out in 1906, and renewed each year, constituted one continuous contract, making us liable for any loss which occurred any time during that period, and discovered within six months from the date of the expiration of the last bond. For the reasons I have stated, Your Honor will understand that such a contention could not be sustained with any justice to an insurance company.

Of course, while I am willing to concede as far as possible the ingenuity of the parties, who, upon discovering the predicament they were in, secured this new bond, and had it dated back, still it might almost be remarked that they were "hoisted by their own petard." Had they discovered the loss when they probably did discover it—and they admitted their discovery along in June sometime—and proceeded upon the old bond, they might have had a cause of action, provided there was fraud or dishonesty, amounting to embezzlement or larceny in the acts of Mr. Mitchell. But they delayed their discovery until more than six months after the termination of the last bond. Then conceiving the idea that the bond, and its various renewals, constitute one continuous contract, they conclude that if they can get a new bond that will operate as a

renewal of the old bond, although that bond, and all liability upon it, has passed at the time. And they do that, notwithstanding the provision in the bond which terminated on April 1st, 1913, that all liability and responsibility shall end when they secure a new bond. So, putting to one side for the present, the question of the conditions or the circumstances under which they secured this bond dated April 1st, 1913—putting to one side for the present those facts—I contend that that is the only bond upon which there could be any liability, and, therefore, I have moved to exclude testimony as to any loss or defalcation, which occurred, during the life of the other bond.

MR. ROBERTS: If the Court please, in the first place, counsel is assuming for the purpose of his argument, certain facts, which must, of necessity be submitted to the jury. In the next place, I think counsel misapprehends the purport of the provisions of this bond, together with the renewals.

THE COURT: When you refer to the renewal, do you mean the last bond?

MR. ROBERTS: Well, upon that, Your Honor, of course, while counsel has not fully stated it, he has probably understood our contention, in that we contend this is one continuous insurance. To illustrate briefly, Your Honor, counsel stated to the jury on Yesterday that upon the expiration of this bond, or that par-

ticular renewal, that this company wrote a letter to Mack A. Mitchell, offering to renew that bond, showing that it meant to continue it in force at that time, but that that letter having fallen into the possession of Mr. Mitchell, he returned it, saying: he didn't want the bond renewed. Now, that is one of the evidences of their intention to renew. We expect to show that it was the arrangement between these parties that this should be renewed—that the company would keep it renewed, and that it did keep it renewed, and that counsel is mistaken when he says that we would apply each year for that renewal. Your Honor has had some experience with insurance, and I think you know that the insurance company usually beats you to it. They don't wait for you. They usually renew it in advance, for fear some other agency will get it away. They renew it, and they tried to renew this, as Mr. Dovell said, but here are the facts: the bank here at Seattle had procured that bond, in the first instance. It had paid the premium, and the business had all been transacted here, and but for the change of the agency, to which counsel referred, that renewal certificate would have been issued by the old agency. Then, we will offer evidence to show, that it was not ourselves who made the discovery that this was not renewed, but that it was made by the old agent of the company, who then went to this com-

pany, and asked them—called their attention to it, and they then agreed with him that it should be renewed, and he went to the bank, and asked them if they knew this bond had not been renewed. That is the way we got the information. The bank had depended solely upon the surety company to keep it renewed. No application had been given. It is the absolute requirement of this company and of all the companies, that upon the execution of a new bond, a written application must be given. None was taken in this case. The company treated it as a renewal and dated it as a renewal—dated it as of the date they should have renewed it originally. Now, so much for those questions, all of which are questions of fact for the jury.

I will say this to Your Honor: that I didn't anticipate this argument at this time, because the law questions were before Your Honor on the pleadings, and while I have a brief, I didn't bring up the authorities, but I believe there is enough here to satisfy Your Honor.

First, as to the first case cited by counsel: that, I think, is not at all controlling. It is an entirely different character of bond. That is what is known as a schedule bond. That is a bond—a blanket bond—written to cover all the employes of any particular institution. Those employes change from year to year, or from time to time, rather, and a company is

required to submit annually a new schedule, giving the names of the employes, and as the court says here, they might be willing to bond certain employes, and not other employes, and that that is one of the reasons, which appears from the contract itself why that was to be merely an annual bond. That is set forth here on page 677:

"To make the contract intelligible, it must be read in connection with the schedule register."

We have nothing of the sort here.

(Reads from opinion.)

Then, in addition to that, Your Honor, that bond carried a rider, which ours does not have, and the court says that they think it is made clear that that was the intention by the rider which is attached. And you will find, by reading that rider, that it says that the bond has been written with the express understanding that the aggregate liability of the American Surety Company "for the acts of any employe under both the bonds herein mentioned shall not during said period exceed the amount of the last guaranty or bond upon the employe for whose acts a claim may be made." No such provision is in this bond.

Now, taking the other case, reported in the 124 Federal, in which the same company was sued as is sued here, at the time this action

was instituted, I considered this question of whether or not I should sue for this entire Forty-three Thousand Dollars, upon the theory that these continuations rendered this cumulative, and there are three cases which have held that that could be done. The Supreme Court of New York, in a late case, held under this very provision, that they were liable for what was lost under one bond for one year, and they were liable under the other one for the other year, and so on. But I reached the conclusion—and that is what this case says that I am going to read to Your Honor, which Mr. Dovell cited, but did not read—that that was the purpose of those provisions, to-wit, to limit at all times the liability of the surety company to $25,000.00 But for those provisions, in this bond, we might recover the whole amount that was lost, since they covered him during the whole period, but with those provisions, notwithstanding the loss during the period exceeded $50,000.00, we are limited in our recovery to $25,000.00. That has been plainly stated here in this opinion. "In my opinion, the whole purpose and intention of this clause is that there shall not be double responsibility on the part of the company. It is not at all inconsistent with the right to discover within six months after the expiration of the original bond, or any renewal, the dishonest acts of

the employe, and to claim indemnity for the same. The original bond and each renewal stands for the malfeasance of the employe during the continuance of each and discovery within six months after the termination of each. The purpose of the above clause evidently is to avoid double liability on the part of the company; that it shall not be liable beyond the amount of the bond as originally given and renewed." Taking this contract altogether, this, in my opinion, is the proper construction to place upon this clause. That is my contention, if the Court please. Now, I assume that the language of that bond is the same as this one, because it is the same company.

The first clause of the bond says: "Which shall have been committed, during the continuance of said term, or of any renewal thereof, and discovered during said continuance, or of any renewal thereof, or within six months thereafter, or within six months from the death or dismissal or retirement of said employe from the service of the employer within the period of the bond."

Now the language of this bond seems to me to be entirely clear.

THE COURT: I don't care to hear from you upon these various renewals upon this bond, but I would like to hear from you as to the operation of the new bond that was given—the

last bond—whether that was a renewal, or whether that was a separate and distinct obligation.

MR. ROBERTS: Of course, we contend that that was a renewal, Your Honor, to all legal effect the same as if one of these certificates had issued. Of course, if we should fail in that contention, then there would be something in the argument of counsel; but that is a question of fact—as to whether or not it was a renewal.

THE COURT: Wherein do you think it is a question of fact?

MR. ROBERTS: Because of the fact that it was in pursuance of the original arrangement and agreement, which existed between us, and because of the fact that that is what we asked them to do, and because as and for a renewal, that is the bond which they gave us.

MR. DOVELL: I thought you said you didn't intend to prove any oral contract.

MR. ROBERTS: No; I didn't say that. I said I didn't intend to offer any evidence on the allegation to which you referred originally—that they had agreed to give us the best bond available. That was the only thing on which I said I would offer no evidence. The question of whether or not that bond, Your Honor, was a renewal, I think, is clearly one of fact. For instance, it was stated here—and that is the fact—that that bond was given on the 24th of

November, or about that date—the 22nd to the 24th of November.

THE COURT: And dated back.

MR. ROBERTS: Yes, Your Honor. Now, if that were not a renewal, what explanation can be offered for the dating of it back? If that were a new contract—a new bond—it would have to have been dated on the date it was executed, it seems to me, would be, in itself, conclusive evidence that that was a renewal of the original contract, because it takes up the original contract, where it had been dropped, and carries it on. There is no other explanation for the dating back of that bond, and I have authorities cited here in my brief, Your Honor, that a bond of this character, dated back, is effective from the date that it bears.

THE COURT: There could be no doubt of that.

MR. ROBERTS: Therefore, this bond was written not for a year from November 24th, but for one year from April 1st—dated April 1st. And the company accepted a premium for that bond. Now, it is true, I will state—the jury being absent—that they tendered that premium back to us later, and we refused to accept it; but that is all a question of fact, I think, to be determined—In other words—if Your Honor has not read the pleadings recently—it is a question of fact to be determined by the Jury whether or not we defrauded them into the execution of that bond.

THE COURT: The last bond?

MR. ROBERTS: Yes; that last bond. The question of fraud, of course, is always a question of fact, so, I say, everything in connection with that last bond is a question of fact. Now, furthermore, as I have already called to Your Honor's attention, they took no application for this bond. They have none, and can't produce any; showing again that it was not a new bond, and not a new contract; but that it was executed in pursuance of the standing arrangement and agreement between them, that they should from time to time, keep this bond renewed. Your Honor it would be inconceivable that this or any other surety company would date a bond back for six, seven or eight months —I think it is—under any other circumstances than that it was a continuation of that insurance contract.

THE COURT: But here you have a different contract; and the terms are idfferent; the requirements are different. The guaranty is different from the old bond. A company can insure past conduct of a party, as well as future, if that is a part of the contract.

MR. ROBERTS: But we are entitled, as I said, to introduce the evidence here, and it is for the Jury to say whether or not that was a new contract, or whether or not it was a continuation of the old one.

THE COURT: But it speaks for itself. It is in writing.

MR. ROBERTS: That is very true, Your Honor, as to the bond, itself. But here are certain facts and circumstances, which it seems to me, are decisive and conclusive; this bond having been, as I said, dated back to the very day that the other one expired, and it having been executed without any written application, or without any guaranty or promise, and without any statement as to the acts of this man Mitchell—with none of those things. And we have here the letter, as I said, of the company, writing up there, and offering this bond as a renewal.

THE COURT: And your bank didn't take it.

MR. ROBERTS: The bank never knew it, if the Court please. The bank never knew it. Bear in mind that Mr. Mitchell didn't have this bond written on himself, and never did. He had nothing to do with it. He was what is called in insurance the risk. Here is a contract of insurance between the bank and the surety company. Now, then, the company—the excuse is, but it is no excuse—having changed its agents, the agent, instead of renewing that bond to the bank, writes a letter to the risk, and asks him if he wants it continued. Now, then, the risk gets the letters, conceals it from his bank, conceals it from the party that demanded the protection, and should have had the protec-

tion, and sends it back, and says that he does not want it renewed, and the bank knows nothing about it—absolutely nothing about it. It seems to me that that fact alone—and we have pleaded that in the reply—is an act of negligence on the part of this surety company—in sending it directly to the man against whom we desired to carry this insurance and this protection.

THE COURT: It was sent to the bank. I take that from the statements of both of you.

MR. ROBERTS: No, it was sent to Mitchell.

MR. DOVELL: It was sent to Mitchell, yes.

MR. ROBERTS: Now, here originally was the situation—and the facts will develop all of this: that the bank was absolutely owned here; the officers and trustees of the bank were all here; and the surety company at all times knew that. The fact that this new agent may not have known it—and I am not saying now whether he did or didn't—but the fact that the new agent didn't know that is no excuse to the company. They had done all the business here; they had been paid all the premiums here; for eight years, they had collected these premiums. They had collected these premiums for eight years. They had done all the business here. They, themselves, renewed the bond from year to year without any action on the part of the bank. The bank had relied upon them from year to year. And, as I said, had not the agency been

changed, this difficulty would never have arisen. It was overlooked by the bank for that reason. And then, when the bank discovered it, which, as I said, was discovered through the old agency, and not on its own account, they asked for a renewal of that bond, and they are given this other bond. Now, what is the difference, if the Court please. The fact is merely that the bankers' association, whatever the name of that may be, had demanded a change in the form of these bonds, and that change had gone into effect, and they gave that bond, then, as a renewal or a continuation of this contract of insurance.

Now, as I said, we certainly have a right to have submitted to the Jury the question of whether or not there was an agreement to renew this insurance from year to year, and the further question of whether or not there was an agreement that this policy should be a renewal. The only reason why it was in a different form, and contained different provisions, was simply, as I said, that the bankers generally had demanded that the provisions of these bonds should be different, and that was not a special bond in this case. The bond they gave to us as a renewal was the bond they were giving then to all persons—the bond they were giving to any one who made application for like insurance. I can see no difference, if the Court please, whether they had

given us one of these certificates, or whether they gave us, in lieu thereof, the other paper, which is now referred to as the new bond. We want the privilege of showing that they agreed to give it to us as a renewal, and that they did give it to us, as a matter of fact, as a renewal, and we want to submit that question of fact to the Jury; first, that they agreed to give it to us as a renewal; second, that they did give it to us as a renewal of this insurance, and as a continuation of the insurance which we had had, and carried, and paid them for, for eight consecutive years.

Now, if the Court please, counsel has said—and I am not sure whether that is included in what Your Honor said you didn't care to hear from me about—But there is a very late case in the 44th Pacific, entitled *United States Fidelity & Guaranty Company vs. Boley Bank & Trust Company*—the same surety company and the same bond as in suit here. The bailiff informs me that the 44 Pacific is not here. I do not contend that the question in that case was the same question as this new bond matter; but it was a case where the bond had been renewed from year to year; and the court held that the company, having renewed this bond and taken these premiums from year to year, was estopped to raise this question about not having made a proper examination of the bank, and they said that if they desired a more

frequent examination, the company had the power to require the same, "but having continued its bond from time to time upon said representations and for a consideration paid by the bank, it is now estopped to deny liability on the ground that the examinations were made at periods more extended than these originally contemplated."

Now, furthermore—and I will not digress far upon this question, but counsel laid much emphasis upon it—the authority—and I have it here—is that upon the question of examination, the insured is required to do nothing which he did not specifically contract to do along that line.

Now, we did not contract to make an examination in this case. Furthermore, I have pleaded here the circumstances, to-wit: that this business was to be transacted in the District of Alaska—a long distance away—and that the surety company knew and understood that. That will appear from the documents themselves—the original application. And in this case, if the Court please, from which I just read, and which came from Oklahoma, the bond was written upon a negro bank in a negro town.

THE COURT: I am familiar with it.

MR. ROBERTS: And the Court said the surety company knew and understood the character of that town, and the character of the people in charge of that bank, and they knew and under-

stood, and it was their duty, as much as that of the insured, to know the facts and circumstances.

Now, one thing more, Your Honor:—and I would like to have Your Honor take sufficient time to investigate further the authorities—the authorities on the rules of construction, for instance—generally—briefly, of course, as you can't read them all; they are too many; but if, in this matter, there should be any doubt, that doubt must be resolved in favor of the assured.

THE COURT: There is no question about that.

MR. ROBERTS: Now, then, I submit that under the liberal rules of construction, if there is any doubt at all—if there is a question of fact whether or not that bond was given as a renewal, then, it must be submitted by the Court, as a question of fact, to the Jury. Now, if I understand Your Honor's frame of mind—and I think I do, the citation of further authority on my part would not help much.

THE COURT: No. What I want to say is: From the argument, here, it is not necessary to determine whether the renewals from 1906 down to 1913 were separate and distinct contracts or not. That is not in this case, because all those renewals must stand together—that is, as far as this case is concerned at this time, because more than six months had elapsed after

the expiration of the renewal policy, if the last policy is not a renewal; so there is nothing to differentiate with relation to the matter that was before Judge Newman in the Georgia case, and I don't care to hear from you upon that phase, because that is not before the Court here.

MR. ROBERTS: I understand counsel in his argument—and I noted it particularly—to concede that this contract continued in force until April 1, 1913.

THE COURT: Oh, yes. But I rather understood from counsel that each renewal was a separate contract.

MR. DOVELL: Yes.

THE COURT: While it was a renewal, yet the policy stood as a separate and distinct contract, the same as though a new policy had been issued; but it remained in force. That was my understanding, and I say that is not a matter that is before us now. Just what this Court would hold on that if that was before the Court, is not clear.

MR. ROBERTS: That is the way practically that I understood Your Honor. That is to say, the matter narrows itself down with Your Honor to the question whether or not we could prove this last policy to be a renewal of the old contract.

THE COURT: Yes; that is the idea.

MR. ROBERTS: Now, then, I don't know that I can add to that much, if the Court please, in addition to what I have already said; but certainly, certainly, if we can prove that they agreed to renew this old contract, and that they did renew this old contract, the form of the renewal is immaterial. The form is immaterial, and, so far as I am concerned, it would be immaterial to us as to whether we were bound by the terms of the old contract or the terms of the new. That would be immaterial, so far as we are concerned.

In other words, it would be immaterial to us whether or not we were entitled to take advantage of the broader provisions of the new contract; but the case would still have to go to the Jury, because there were losses under the new contract. So, as I said, I think it would certainly not be advisable for the Court to undertake at this time to say in advance of the offering of any testimony that we would not be permitted to offer any testimony in relation to the renewal of this contract.

MR. DOVELL: Maybe we would pay the losses under the new policy.

MR. ROBERTS: The very best answer to that is that you haven't. You have not offered to do so, or intended to do so, but have denied all liability. I think, if the Court please, that we must be allowed to put all the facts before the Jury, and that if Your Honor should later

determine that we were not entitled to this, it could then be taken away, but the evidence would then have been taken, and we would have a record. So I think the Court ought to allow the matter to be submitted, as a question of fact. And, as I said, I would like Your Honor, before finally determining this question, to look into the authorities which I have cited there, and which, while perhaps, not directly in point on this question, yet will certainly throw some light upon it.

THE COURT: I will state, Mr. Roberts, that I read over your memorandum of authorities since yesterday—since Court adjourned yesterday, and likewise yours, Mr. Dovell, and I am thoroughly convinced in my mind that the last bond,—, considering the opening statement to the Jury, and the matters which seem to be agreed upon in the argument this morning—cannot in law be considered to be a renewal and a continuation of the conditions of the old obligation, or such an instrument as continues the obligations under the old bond; and the taking of testimony with relation to that, and whether or not that would be a renewal, and submitting it to the Jury, and then taking it from the Jury, would be a waste of time. I take it from the statement of counsel that it would require some time to do that, and feeling as I do with relation to it, I don't think it

would be justified. How would the Court instruct the Jury? He would say: "Here are two bonds. One bond contains such rights and such obligations. Now, here is another bond. This contains broader obligations and rights." Now, under which bond would it come? It would not come under both. If it is a continuation and a renewal, where would you be. If it is a renewal, you would have to recover under the old bond, and disregard the new one. I couldn't instruct the Jury under that, because it is a renewal. It is changed considerably. We proceed then on a new theory. So that I think this motion must be granted with relation to that old bond, and any recovery under the old bond, or for any sort of misconduct that were sought to be insured against in the old bond, I think will have to be disregarded, and we will have to proceed here, and determine what are the facts with relation to what was the new bond, and whatever that would culminate in, that can be recovered. But I think the other is clearly not proper to be submitted. I will frankly state to you now, while it is not here, I have very serious doubts in my mind whether or not those renewal bonds are separate and distinct obligations, and the rights of the parties to recover must be regulated with that in view, even though they are renewals, because it contains the same terms and conditions as the old contract, but it is a new con-

tract. Now, as to the statement in relation to failure on the part of the insurance company to renew this bond, and that there was an agreement on their part to keep it in force, that can't obtain here. If there was any negligence here, the cause of action arose because of the act or failure of the company to do what it had agreed to do, and that would be another cause of action. That would not be this action—but an action upon a contract. That is upon another ground or theory, and could not be invoked here.

MR. ROBERTS: That is in reply to their pleading, which sets forth that we had wrongfully obtained this last renewal from them after the date of the expiration of the other bond.

THE COURT: Yes. Whether this last bond was wrongfully obtained when the fraud was practiced on the part of the assured—Of course, that is an issue here. That can be determined. But anything of that kind would not date back to the old bond. That is a new relation.

MR. ROBERTS: That is true under Your Honor's theory of the contract, but, of course, I think Your Honor has a wrong understanding—

THE COURT: Yes. I understand that, from your view, you think my conclusions are wrong, but there is not any other way that I can approach it from the various view points to which it presents itself to my mind. Note an exception to the conclusion of the Court.

MR. ROBERTS: This amounts, then, to a holding by the Court at this time, that upon a demurrer, or what is equivalent to a demurrer, the pleading does not state facts sufficient to justify any recovery upon any other than the last bond.

THE COURT: It would be hardly that. While this matter was before me, I think, on a motion heretofore, I denied the motion at the time with some observation that the matters could be, perhaps disposed of on the trial. After listening to the opening statement to the Jury as to what the facts in the case are, and likewise the facts as developed in the argument, and conceded by counsel, and the matters presented this morning, I am convinced beyond any question of doubt in my mind that this is the only real conclusion that can be placed upon the facts, as conceded and stated.

MR. ROBERTS: What I was trying to arrive at by my question to Your Honor was this: Some way to have the matter determined now as a question of law, so that we could determine—

MR. DOVELL: I think it is determined, Mr. Roberts.

MR. ROBERTS: Oh, no. Mr. Dovell says he thought it was determined, but the difficulty is that we have pleaded a loss which continues over under this last renewal, and it would take all the evidence, just the same, to prove the

little loss, that it would take to prove the whole case.

MR. DOVELL: No; it would not. Tell us how much that is, and we will try to figure on it.

MR. ROBERTS: It is set forth in the pleading.

THE COURT: Yes.

MR. ROBERTS: It is itemized. $780.87.

THE COURT: I noticed the stenographers taking all the statements and all the arguments, so the whole record is before the Court.

(Whereupon, at 11:30 A. M., a recess was taken).

MR. DOVELL: The defendant agrees that judgment may run in favor of the plaintiff for 688.27, it being understood that said defendant does not, in any particular, admit or confess that the Mack A. Mitchell mentioned in the complaint has been guilty of any act of fraud or dishonesty, or forgery, theft, larceny, embezzlement, wrongful abstraction or misapplication, or misappropriation, or any criminal act, and I believe counsel for the defendant is ready to—

MR. ROBERTS: Now, I desire, if the Court please, to offer at this time to prove that the renewal, or so-called renewal, or what is called by counsel the last bond, was given as a renewal of the old bond, and was, as a matter of fact, a continuation of the contract of insurance and the continuations by renewal from year to year from 1906, and that it was agreed

between the Miners & Merchants Bank and the United States Fidelity & Guaranty Company that said contract of insurance should be continued and renewed from year to year, and that the bond or instrument dated April 1, 1913, was executed and delivered as a renewal and continuation of the former contract of insurance; and to prove all the allegations of plaintiff's complaint.

MR. McCLURE: That proof will be by parol? Your proof will be oral and not written?

MR. ROBERTS: I have both written and oral evidence to prove that fact.

MR. DOVELL: To that we will object upon the ground that all negotiations between the parties were merged in the various written contracts set forth in the complaint, and any testimony of the character suggested by counsel would be an attempt to vary, enlarge or change contracts complete and unambiguous in their terms.

THE COURT: I take it that this offer is now in harmony and in support of the statements made to the Jury in the opening statement as to the manner in which these matters would be established?

MR. ROBERTS: And the statements made to Your Honor this morning in open Court, and in the pleadings.

THE COURT: Yes. All right. The objection to the offer will be sustained. The offer is denied.

MR. ROBERTS: And an exception allowed.

THE COURT: Yes. Judgment will be entered in favor of the plaintiff for the amount stated. Exception allowed.

BE IT FURTHER REMEMBERED, that in due time plaintiff submits the foregoing as its proposed bill of exceptions herein, and prays that the same may be settled and allowed.

Dated this 28th day of June A. D. 1915.

JOHN W. ROBERTS and
GEORGE L. SPIRK,
Attorneys for Plaintiff.

The foregoing Bill of Exceptions is presented in due time and is true and correct, and the same may be settled and filed.

McCLURE & McCLURE,
HUGHES, McMICKEN,
DOVELL & RAMSEY,
Attorneys for Defendants.

Now, on this 12th day of July, 1915, this cause coming regularly on to be heard on the application of the plaintiff to have its proposed Bill of Exceptions settled, signed, filed and made of record in said cause, the parties hereto appearing by their respective counsel, and it appearing to the Court that the foregoing Bill of Exceptions contains all the facts upon which the said cause was tried before the undersigned Presiding Judge upon the

trial of said cause, and all the evidence and testimony offered upon the trial of said cause, and all objections made by counsel for the respective parties to the receiving or rejection of said evidence offered, and all the motions and the rulings of the Court thereon, and all exceptions taken at the time thereto, the said Bill of Exceptions has been examined and found correct, and contains all the material facts, matters and proceedings, not already a part of the record in said cause, and is hereby settled, signed and ordered filed and made a record herein, all of which is accordingly done by the undersigned, the Judge before whom the said cause was tried.

JEREMIAH NETERER,
Judge of the United States District Court for the Western District of Washington, Northern Division.

Service of the foregoing proposed Bill of Exceptions by delivery of a copy thereof to the undersigned is hereby acknowledged this 2nd day of June, A. D. 1915.

W. G. DOVELL,
Attorneys for Defendant.

Checked. Plaintiff's Proposed Bill of Exceptions was lodged with the Clerk of this Court June 29th, 1915. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 12, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

## PETITION FOR WRIT OF ERROR

Now comes Miner's & Merchant's Bank, a corporation, plaintiff herein, and says:

That on the 22nd day of June, A. D. 1915, this Court entered a decree herein, in which decree and the proceedings had prior thereunto in this cause, certain errors were committed to the prejudice of this plaintiff, and of which more in detail appears from the assignment of errors which is filed with this petition.

Wherefore, the plaintiff prays that a Writ of Error may issue in this behalf out of the United States Circuit Court of Appeals, Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in this cause duly authenticated may be sent to the United States Circuit Court of Appeals.

JOHN W. ROBERTS,
GEORGE L. SPIRK,
Attorneys for Plaintiff.

Indorsed: Petition for Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk, By Ed. M. Lakin, Deputy.

## ASSIGNMENT OF ERRORS

Comes now Miners & Merchants Bank, a corporation, the plaintiff herein, and assigns errors in the trial, decisions, rulings, decree and orders of said District Court in said cause, as follows:

I

The District Court of the United States for the Western District of Washington, Northern Division, erred in granting the motions made by the defendant to exclude testimony on behalf of the plaintiff, and in sustaining the motions made by the defendant to exclude all testimony except such as related to the bond of April 1, 1913.

II

Said Court erred in sustaining the motion of the defendant to exclude the testimony touching any alleged loss occasioned by any wrongful act or conduct of Mack A. Mitchel, occurring prior to April 1, 1912.

III

Said Court erred in sustaining the motion of defendant to exclude all testimony touching any alleged loss occasioned by any wrongful act or conduct of Mack A. Mitchell, occurring prior to April 1, 1913.

IV

Said Court erred in refusing to allow the plaintiff to offer proof to sustain the allegations of its complaint, and in refusing to allow plaintiff to

introduce evidence to establish the facts which it offered to prove.

V

Said Court erred in excluding the offer of testimony on behalf of the plaintiff to prove the allegations of its complaint, and to prove that the bond was at all times during the periods named in the complaint renewed and continued in force, and in refusing to allow plaintiff to prove that the instrument of April 1, 1913, was a continuation and renewal bond, and, by agreement between the parties, was to be and was at all times so treated and stated.

VI

Said Court erred, first, in refusing to allow the plaintiff to prove as a matter of fact, that it at all times had an agreement with the defendant surety company that the bond and contract of suretyship was to be at all times continued in force until further notice; second, in refusing to allow the plaintiff to prove as a question and matter of fact that said instrument, called the last bond, was given in pursuance of said contract, as such renewal, and that the said instrument was, as a question and matter of fact, a renewal bond, and given as a renewal bond, and was a continuation of the contract of insurance.

VII

Said Court erred in denying the offer of proof made by the plaintiff, and in failing to submit to

the jury for determination, the issues between the parties hereto, as set forth in the complaint.

VIII

Said Court erred in overruling the motion of the plaintiff for a new trial, and erred in refusing to the plaintiff a rehearing and a retrial in the cause.

IX

Said Court erred in entering the final judgment, and erred in entering judgment for the plaintiff only in the sum which the defendant surety company was willing to admit to be due; and erred in entering final judgment in favor of the defendant, against the plaintiff, and erred in not hearing the evidence, and entering the final judgment for the plaintiff for the full amount prayed for by the plaintiff in the cause.

Wherefore, the plaintiff prays that the said judgment of the said District Court of the United States for the Western District of Washington, Northern Division, be reversed.

Dated this 28th day of June, A. D. 1915.

JOHN W. ROBERTS,
GEORGE L. SPIRK,
Attorneys for Plaintiff.

Indorsed: Assignment of Errors. Filed in the District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

## ORDER ALLOWING WRIT OF ERROR

On this 29th day of June, 1915, comes the plaintiff, by its attorneys, and files herein and presents to the Court its petition praying for the allowance of a writ of error, an assignment of errors intended to be urged by them, praying also that a transcript of the record, proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Judicial Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration whereof, the Court does allow the writ of error upon plaintiff giving a bond according to law in the sum of Two hundred fifty dollars ($250.00), which will operate as a bond for costs.

JEREMIAH NETERER, Judge.

Indorsed: Order allowing Writ of Error. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915, Frank L. Crosby, Clerk. By Ed. M. Lakin, Deputy.

## BOND ON WRIT OF ERROR

Know All Men By These Presents That Miner's & Merchants Bank, a corporation, plaintiff herein, as principal, and the National Surety Company, a corporation, as surety, for and on behalf of said Miner's & Merchants Bank, are held and firmly bound unto United States Fidelity & Guaranty Company, the defendant herein, in the full sum of Two hundred and fifty ($250.00) dollars, to be paid to the said United States Fidelity & Guaranty Company, a corporation, its attorneys, successors or assigns, to which payment well and truly to be made, we bind ourselves, our assigns, and successors, jointly and severally by these presents.

Sealed with our seal, and dated this 28th day of June in the year of our Lord, One thousand nine hundred and fifteen (1915).

Whereas in the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in said Court between Miner's & Merchants Bank, a corporation, plaintiff and United States Fidelity & Guaranty Company, a corporation, defendant, a judgment was rendered in favor of the plaintiff, Miner's & Merchants Bank, and against the defendant, United States Fidelity & Guaranty Company, as to one of its causes of action, and in favor of the defendant and against the plaintiff as to certain other of the plaintiff's causes of action, and said plaintiff having obtained from said court a Writ of Error to modify

and reverse so much of the judgment in the aforesaid suit as is in favor of the defendant and against the plaintiff, and a citation directed to said United States Fidelity & Guaranty Company, a corporation, citing and admonishing it to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California.

Now, the condition of the above obligation is such that if said plaintiff, Miner's & Merchants Bank, a corporation, shall prosecute said Writ of Error to effect, and answer all damages and costs, if they shall fail to make good their plea then the above obligation to be void; otherwise, to remain in full force and effect.

MINER'S & MERCHANTS BANK,
By J. E. Chilberg, Pres.
NATIONAL SURETY COMPANY,
By Geo. W. Allen, Attorney in Fact

(SEAL)

Approved this 29th day of June, A. D. 1915.

By JEREMIAH NETERER,
District Judge.

Indorsed: Cost Bond on Appeal. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

## ACCEPTANCE OF SERVICE

We the undersigned attorneys for the defendant, United States Fidelity & Guaranty Company, a corporation, do hereby admit service and receipt of copies of the Petition for Writ of Error, Assignment of Errors, Order Allowing Petition for Writ of Error, Bond on Writ of Error, Writ of Error, and Citation on Writ of Error, and do hereby waive any other or further service of said matters.

Dated at Seattle, Washington, this 29th day of June, A. D. 1915.

McCLURE & McCLURE,
HUGHES, McMICKEN,
DOVELL & RAMSEY,
Attorneys for Defendants.

Indorsed: Acceptance of Service. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, July 12, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

## PRAECIPE FOR TRANSCRIPT

To The Clerk of The Above Entitled Court:

You will please prepare and certify, to constitute the transcript of record on appeal in the above entitled cause, typewritten copies of the following enumerated papers, omitting all captions, verifications, acceptances of service, and other indorsements, except file marks:

1. Complaint.
2. Answer.
3. Reply.
4. Decree.
5. Motion for New Trial.
6. Order Denying Motion for New Trial.
7. Bill of Exceptions and Order Settling Bill of Exceptions.
8. Petition for Writ of Error.
9. Assignment of Errors.
10. Order Allowing Writ of Error.
11. Bond on Writ of Error and Approval thereof
12. Acceptance of Service.
13. Writ of Error.
14. Citation.

JOHN W. ROBERTS,
GEO. L. SPIRK,
Attorneys for Plaintiff.

Indorsed: Praecipe for Transcript. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

## CERTIFICATE OF CLERK U. S. DISTRICT COURT TO TRANSCRIPT OF RECORD

UNITED STATES OF AMERICA, WESTERN DISTRICT OF WASHINGTON.—ss.

I, Frank L. Crosby, Clerk of the United States District Court, for the Western District of Washington, do hereby certify the foregoing 132 printed pages numbered from 1 to 138, inclusive, to be a full, true, correct and complete copy of so much of the record, papers, and other proceedings in the above and foregoing entitled cause, as are necessary to the hearing of said cause on Writ of Error therein in the United States Circuit Court of Appeals for the Ninth Circuit, and as is stipulated for by counsel of record herein, as the same remain of record and on file in the office of the Clerk of said District Court, and that the same constitutes the record on return to said Writ of Error herein from the judgment of said United States District Court for the Western District of Washington to the United States Circuit Court of Appeals for the Ninth Circuit.

I further certify the following to be a full, true and correct statement of all expenses, costs, fees and charges incurred and paid in my office by or on behalf of the Plaintiff in Error for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit in the above entitled cause, to-wit:

Clerk's fee (Sec. 828 R. S. U. S.), for making record, certificate or return; 305 folios at 15c ..... $45.75
Certificate of Clerk to transcript of record; 4 folios at 15c ..... .60
Seal to said Certificate ..... .20
Statement of cost of printing said transcript of record, collected and paid ..... 142.00

Total ..... $188.55

I hereby certify that the above cost of preparing and certifying record amounting to $188.55, has been paid to me by Messrs. John W. Roberts and George L. Spirk, Attorneys for Plaintiff in Error.

I further certify that I hereto attach and herewith transmit the original Writ of Error and Citation issued in this cause.

In witness whereof I have hereto set my hand and affixed the seal of said District Court at Seattle, in said District, this 24th day of July, 1915.

(SEAL)

FRANK L. CROSBY,
Clerk U. S. District Court.

## WRIT OF ERROR

UNITED STATES OF AMERICA, NINTH JUDICIAL CIRCUIT.—SS.

The President of the United States of America to the Honorable Judges of the District Court of United States for the Western District of Washington, Northern Division, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which in said Circuit Court of Appeals before you, or some of you, between Miner's & Merchants Bank, a corporation, Plaintiff in Error, and United States Fidelity & Guaranty Company, a corporation, Defendant in Error, a manifest error hath happened to the great damage of said Miner's & Merchants Bank, a corporation, Plaintiff in Error, as by its complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City of San Francisco, State of California, in said Circuit, within thirty (30) days from the date hereof, in said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected,

the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable E. D. White, Chief Justice of the Supreme Court of the United States of America, this 29th day of June, A. D. 1915.

Attest: FRANK L. CROSBY,
Clerk of the Circuit Court of Appeals of the United States of America for the Ninth Circuit.

By Deputy.

(SEAL)

The foregoing Writ is hereby allowed.

JEREMIAH NETERER, Judge.

Indorsed: Original. No. 2750. In the United States Circuit Court of Appeals for the Ninth Circuit. Miner's & Merchants Bank, a corporation, Plaintiff in Error, vs. United States Fidelity & Guaranty Company, a corporation, Defendant in Error. WRIT OF ERROR. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.

## CITATION

UNITED STATES OF AMERICA.—SS.

The President of the United States, to the United States Fidelity & Guaranty Company, a corporation, GREETING:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit to be holden at the City of San Francisco, in the State of California, within thirty (30) days from the date hereof, pursuant to a Writ of Error duly issued and now on file in the office of the Clerk of the United States District Court for the Western District of Washington, Northern Division, wherein Miner's & Merchants Bank, a corporation, is Plaintiff in Error, and you are Defendant in Error, to show cause, if any there be, why so much of the judgment rendered against the said Plaintiff in Error as in said Writ of Error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable E. D. WHITE, Chief Justice of the Supreme Court of the United States, this 29th day of June, A. D. 1915.

(SEAL)

JEREMIAH NETERER,
United States District Judge.

Indorsed: Original. No. 2750. In the District

Court of the United States for the Western District of Washington, Northern Division. Miner's & Merchants Bank, a corporation, Plaintiff, vs. United States Fidelity & Guaranty Company, a corporation, Defendant. CITATION. Filed in the U. S. District Court, Western Dist. of Washington, Northern Division, June 29, 1915. Frank L. Crosby, Clerk. By Ed M. Lakin, Deputy.